APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

01-1296

IAIN FRASER; STEVE TRITTSCHUH; SEAN BOWERS; MARK SEMIOLI; RHETT HARTY; DAVID SCOTT VAUDREUIL; MARK DODD; MARK DOUGHERTY
Plaintiffs-Appellants,

PAUL CALIGUIRI; TIM MARTIN;
Plaintiffs,

v.

MAJOR LEAGUE SOCCER, L.L.C.; ROBERT KRAFT; LOS ANGELES SOCCER PARTNERSHIP, L.P.; WASHINGTON SOCCER, L.P.; UNITED STATES SOCCER FEDERATION, INC.; KRAFT SOCCER, INC. a COLORADO CORPORATION; ANSCHUTZ SOCCER, INC. a COLORADO CORPORATION; TEAM COLUMBUS SOCCER, a DELAWARE LIMITED LIABILITY COMPANY; TEAM KANSAS CITY SOCCER LLC, a DELAWARE LIMITED COMPANY; EMPIRE SOCCER CLUB, L.P., a DELAWARE LIMITED PARTNERSHIP; ANACHUTZ CHICAGO SOCCER, INC.; SOUTH FLORIDA SOCCER, L.L.C.;
Defendants-Appellees,

PHILIP ANSCHUTZ; HUNT SPORTS INVESTMENTS; METROMEDIA COMPANY
Defendants.

BEFORE: Boudin, *Chief Judge*, Coffin, *Senior Circuit Judge*, Lipz, *Circuit Judge*, Woodlock, *District Court Judge*.

ORDER OF COURT

Entered: April 23, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is further ordered that the petition for rehearing and the suggestion for a rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/ _____
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 01-1296

IAIN FRASER; STEVE TRITTSCHUH; SEAN BOWERS; MARK SEMIOLI; RHETT HARTY; DAVID SCOTT VAUDREUIL; MARK DODD; AND MARK DOUGHERTY,
Plaintiffs, Appellants,

v.

MAJOR LEAGUE SOCCER, L.L.C.; KRAFT SOCCER, L.P.; ANSCHUTZ SOCCER, INC.; ANSCHUTZ CHICAGO SOCCER, INC.; SOUTH FLORIDA SOCCER, L.L.C.; TEAM COLUMBUS SOCCER, L.L.C.; TEAM KANSAS CITY SOCCER, L.L.C.; LOS ANGELES SOCCER PARTNERS, L.P.; EMPIRE SOCCER CLUB, L.P.; WASHINGTON SOCCER, L.P.; AND UNITED STATES SOCCER FEDERATION, INC.,
Defendants, Appellees.

Heard Oct. 1, 2001.
Decided March 20, 2002.

Before BOUDIN, *Chief Judge*, COFFIN, *Senior Circuit Judge*, andWOODLOCK,* *District Judge*.

BOUDIN, *Chief Judge*.

Professional soccer players sued Major League Soccer, LLC ("MLS"), nine independent operator/investors in MLS, and the United States Soccer Federation, Inc. ("USSF"), alleging violations of Sherman Act sections 1 and

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* Of the District of Massachusetts, sitting by designation.

2, 15 U.S.C. §§ 1-2, and Clayton Act section 7, *id.* § 18, and seeking injunctive relief and monetary damages.[1] The district court granted summary judgment for defendants on the section 1 and Clayton Act counts. After a twelve-week long trial on the section 2 count, the jury returned a special verdict leading to judgment in favor of defendants. Players now appeal the disposition of all three counts. We begin with a statement of the background facts.

I. BACKGROUND FACTS

Despite professional soccer's popularity abroad, the sport has achieved only limited success in this country. Several minor leagues have operated here (four such leagues exist today), but before the formation of MLS, only one other U.S. professional league—the North American Soccer League ("NASL")—had ever obtained Division I, or top-tier, status. Launched in 1968, the NASL achieved some success before folding in 1985; MLS attributes the NASL's demise in part to wide disparities in the financial resources of the league's independently owned teams and a lack of centralized control.

In 1988, the USSF, the national governing body of soccer in the United States, 36 U.S.C. § 220501 *et seq.*, was awarded the right to host the 1994 World Cup soccer tournament in the U.S. by the Federation Internationale de Football Association ("FIFA"), soccer's international governing body. In consideration for the coveted sponsorship rights, the USSF promised to establish a viable Division I professional soccer league in the U.S. as soon as possible.

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[1] The plaintiffs comprise eight named MLS players and a certified injunctive class of 600 past, present, and future MLS players. The operator/investors named in the suit include: Kraft Soccer, LP; Anschutz Soccer, Inc.; Anschutz Chicago Soccer, Inc.; South Florida Soccer, LLC; Team Columbus Soccer, LLC; Team Kansas City Soccer, LLC; Los Angeles Soccer Partners, LP; Empire Soccer Club, LP; and Washington Soccer, LP.

The USSF decided as early as 1988 to sanction only one Division I professional league. The concern was that sanctioning rival leagues would dilute revenues, drive up costs, and thereby dim the long-term prospects for Division I soccer in the U.S. Indeed, MLS contends no other country has sanctioned more than one Division I league within its borders, although arrangements in other countries could be variously described.

Just before World Cup USA play began, in early December 1993, three organizations presented competing plans to develop a Division I professional soccer league to the USSF National Board of Directors. The three competing organizers were: League One America; the American Professional Soccer League ("APSL"), an existing Division II league; and Major League Professional Soccer ("MLPS"), the precursor to MLS, headed by the USSF's own president, Alan Rothenberg.

At its December 5, 1993, meeting the USSF board tentatively selected MLPS as the exclusive Division I professional soccer league in the U.S., based upon its relatively strong capitalization, higher proposed spending, business plan and management. The board also reaffirmed its intention to sanction only one Division I league. But in January 1995, the USSF announced that it would consider sanctioning additional leagues which could meet rigorous new financial and operating standards beginning with the 1998 season.

In the wake of a successful World Cup USA, MLS was officially formed in February 1995 as a limited liability company ("LLC") under Delaware law. The league is owned by a number of independent investors (a mix of corporations, partnerships, and one individual) and is governed by a management committee known as the board of governors.

Some of the investors are passive; others are also team operators as explained below.

MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all intellectual property rights, tickets, supplied equipment, and broadcast rights. MLS sets the teams' schedules; negotiates all stadium leases and assumes all related liabilities; pays the salaries of referees and other league personnel; and supplies certain equipment.

At issue in this case is MLS's control over player employment. MLS has the "sole responsibility for negotiating and entering into agreements with, and for compensating, Players." In a nutshell, MLS recruits the players, negotiates their salaries, pays them from league funds, and, to a large extent, determines where each of them will play. For example, to balance talent among teams, it decides, with the non-binding input of team operators, where certain of the league's "marquee" players will play.

However, MLS has also relinquished some control over team operations to certain investors. MLS contracts with these investors to operate nine of the league's teams (the league runs the other three). These investors are referred to as operator/investors and are the co-defendants in this action. Each operator/investor has the "exclusive right and obligation to provide Management Services for a Team within its Home Territory" and is given some leeway in running the team and reaping the potential benefits therefrom.

Specifically, the operator/investors hire, at their own expense and discretion, local staff (including the general managers and coaches of their respective teams), and are responsible for local office expenses, local promotional costs for home games, and one-half the stadium rent (the same

portion as MLS). In addition, they license local broadcast rights, sell home tickets, and conduct all local marketing on behalf of MLS; agreements regarding these matters do not require the prior approval of MLS. And they control a majority of the seats on MLS's board, the very same body which runs the league's operations. Among other things, the board is responsible for hiring the commissioner and approving national television contracts and marketing decisions, league rules and policies (including team player budgets), and sales of interests.

The operator/investors also play a limited role in selecting players for their respective teams. While the operating agreements provide that the operator/investors will not bid independently for players against MLS, they may trade players with other MLS teams and select players in the league's draft. Such transactions, however, must follow strict rules established by the league. Most importantly, no team may exceed the maximum player budget established by the management committee.

In return for the services of the operator/investors, MLS pays each of them a "management fee" that corresponds (in large part) to the performance of their respective team. The management fee equals the sum of one-half of local ticket receipts and concessions; the first $1,125,000 of local broadcast revenues, increasing annually by a percentage rate, plus a 30% share (declining to 10% by 2006) of any amount above the base amount; all revenues from overseas tours; a share of one-half the net revenues from the MLS Championship Game and a share of revenues from other exhibition games.

The remaining revenues of the league are distributed in equal portions to all investors. Thus, while the investors qua investors share equally in the league's profits and losses, the individual team operators qua operators fare differently depending at least in part on the financial performance of

their respective teams. It bears mentioning, however, that neither the league nor, apparently, any of its teams has yet made a profit.

Although the league retains legal title to the teams, the operator/investors may transfer their operating rights, within certain limits, and retain much of the value created by their individual efforts and investments. Investors may transfer their ownership stakes and operating rights to other current investors without obtaining prior consent; transfers to outside investors, however, require a two-thirds majority vote of the board. For its part, MLS may terminate any operating agreement on its own initiative if, by a two-thirds vote of the board, an operator/investor is determined to have failed to act in the best interests of the league. If so, it must still pay such operator/investor fair market value for its operating rights and ownership interest.

The league began official play in 1996. The following February of 1997, eight named players sued MLS, the USSF, and the operator/investors under various antitrust theories. The injunctive class was certified in January of 1998. *Fraser v. Major League Soccer, LLC*, 180 F.R.D. 178 (D.Mass. 1998). In count I, the players claimed MLS and its operator/investors violated Sherman Act section 1 by agreeing not to compete for player services. In count III,[2] the players claimed MLS monopolized or attempted to monopolize, or combined or conspired with the USSF to monopolize, the market for the services of Division I professional soccer players in the U.S., in violation of Sherman Act section 2, by preventing any other entity from being sanctioned as a Division I professional soccer league in the United States or otherwise competing against MLS. In count IV, the players

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[2] Count II, a challenge to FIFA's transfer fee policies, and a state law contract claim were severed and stayed pending final resolution of this appeal.

claimed that the combination of assets of the operator/ investors in MLS substantially lessened competition and tended to create monopoly in violation of Clayton Act section 7.

In February 1998, before the close of discovery, MLS and its operator/investors moved for summary judgment on counts I and IV; players cross-moved, seeking to block MLS from asserting a single entity defense on count I. On April 19, 2000, the district court granted MLS summary judgment on both counts, holding that MLS and its operator/investors comprised a single entity and as such, could not conspire in violation of section 1. *Fraser v. Major League Soccer, LLC*, 97 F.Supp.2d 130, 135-39 (D.Mass.2000). On the section 7 claim, the court held that the creation of MLS "did not reduce competition in an existing market because when the company was formed there was no active market for Division I professional soccer in the United States." *Id.* at 141.

Subsequently, at a June 2000 status conference on the remaining section 2 claims, players indicated (apparently for the first time) that they intended to introduce evidence that MLS prohibited all competition for players among the MLS operators/investors as part of their section 2 claim as well. The court, however, prohibited players from introducing evidence on the operation of MLS—except to the extent it provided the jury with useful background information—finding this version of players' monopoly conduct argument precluded by its earlier section 1 summary judgment decision.

A three-month jury trial commenced in September 2000 on players' remaining section 2 claims. At the close of evidence, the court dismissed the section 2 claims against the operator/investors, and that ruling is not appealed now, leaving only MLS and the USSF as defendants. Fed.R.Civ.P. 50. The court then submitted a 15-question special verdict form to the jury. On December 11, 2000, the jury returned its verdict after answering only the first two questions. It found

that players had failed to prove what they had alleged, namely, that the relevant geographic market is the United States and that the relevant product market is limited to Division I professional soccer players. The court thereafter entered judgment dismissing count III and denied players' Rule 50 motions. Players then filed this appeal.

II. SHERMAN ACT *SECTION 1*

Some have urged that sports leagues in general be treated as single entities—individual sports teams, after all, must collaborate to produce a product. *Cf. Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 599-600 (7th Cir.1996); *NFL v. N. Am. Soccer League,* 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982) (Rehnquist, J., dissenting from the denial of certiorari). However, this approach has not been adopted in this circuit, *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir.1994), and we must work with the framework of existing circuit law. Single entity status for ordinarily organized leagues has been rejected in several other circuits as well.[3]

Even so, the district court concluded that under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), MLS and its operator/investors were uniquely integrated and did comprise a single entity. *Copperweld* established that a parent and its wholly owned subsidiary are not subject to attack under section 1 for agreements between them. They are treated for section 1 purposes as a single economic actor. But what the Supreme Court has never decided is how far *Copperweld* applies to

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[3] *E.g., Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1388-90 (9th Cir.1984); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1256-58 (2d Cir.1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1185-86 (D.C.Cir.1978); *Mackey v. NFL*, 543 F.2d 606, 620 (8th Cir.1976).

more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.

While MLS defends the district court's single entity ruling, players say that this view is form over substance and the substance is simply a conspiracy among *de facto* team owners to fix player salaries, which they claim to be a *per se* violation of the antitrust laws. We disagree completely with this latter characterization. We also find that the case for applying single entity status to MLS and its operator/investors has not been established but that in this case the jury verdict makes a remand on the section 1 claim unnecessary.

If ordinary investors decided to set up a company that would own and manage all of the teams in a league, it is hard to see why this arrangement would fall outside *Copperweld*'s safe harbor. Certainly the potential for competition within the firm is not enough: after all, a railroad could in theory provide alternative routes between the same cities and a grocery could locate competing branches of its chain quite near one another; yet no law requires competition within a company. It is common practice, but hardly essential, that the teams in a sports league have independent owner/managers.

Further, MLS is manifestly more than an arrangement for individual operator/investors by which they can cap player salaries. In many ways, MLS does resemble an ordinary company: it owns substantial assets (teams, player contracts, stadium rights, intellectual property) critical to the performance of the league; a substantial portion of generated revenues belongs to it and is to be shared conventionally with both operator/investors and passive investors. And the fact that MLS was structured with the aim of achieving results that might not otherwise be possible does not automatically condemn it.

Focusing on the operator/investors' role as stockholders, the district court stressed that both sides of the supposed conspiracy were parts of the same corporate entity; and it noted that "unlike MLS, NFL football clubs do not exist as part of an overarching corporate structure." *Fraser*, 97 F.Supp.2d at 138 n. 10. And, as *Copperweld* itself shows, its protection is not lost merely because there are separate legal entities—here, the operator/investors—or because one posits arrangements between them and MLS that could not be made by existing competitors without violating the antitrust laws.

Nevertheless, it is hard to treat the corporate integration as conclusive. The challenge here is primarily to the operator/investors' role as team managers, not as ordinary stockholders, and to restrictions imposed on them in that role preventing competition for player services. That a stockholder may be insulated by *Copperweld* when making ordinary governance decisions does not mean automatic protection when the stockholder is also an entrepreneur separately contracting with the company.[4] Above all, there are functional differences between this case and *Copperweld* that are significant for antitrust policy.

First, there is a diversity of entrepreneurial interests that goes well beyond the ordinary company. MLS and its operator/investors have separate contractual relationships giving the operator/investors rights that take them part way along the path to ordinary sports team owners: they do some independent hiring and make out-of-pocket investments in their own teams; they retain a large portion of the revenues from the activities of their teams; and each has limited sale

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[4] *Cf. Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469-70 (8th Cir.1985), and *Greenville Publ'g Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir.1974) (both cases standing for the proposition that antitrust immunity covering an action between a corporation and its agent does not extend to action of the agent acting in its own behalf).

rights in its own team that relate to specific assets and not just shares in the common enterprise. One might well ask why the formal difference in corporate structure should warrant treating MLS differently than the National Football League or other traditionally structured sports leagues.

This contrasts with *Copperweld*'s observation that the parent and its wholly owned subsidiary in that case shared a "complete unity of interests." 469 U.S. at 771, 105 S.Ct. 1005. The phrase is not self-executing and, in addition, it could be taken to explain *Copperweld*'s result without being an outer limit of the defense. *Chicago Prof'l Sports*, 95 F.3d at 598. Still, the existence of distinct entrepreneurial interests possessed by separate legal entities distinguishes *Copperweld*; it further indicates that certain functions have already been disaggregated and assigned to different entities; and it makes the potential for actual competition closer to feasible realization.

Second, in this case the analogy to a single entity is weakened, and the resemblance to a collaborative venture strengthened, by the fact that the operator/investors are not mere servants of MLS; effectively, they control it, having the majority of votes on the managing board. The problem is especially serious where, as here, the stockholders are themselves potential competitors with MLS and with each other. Here, it is MLS that has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, *i.e.*, limiting competition among operator/investors.

From the standpoint of antitrust policy, this prospect of horizontal coordination among the operator/investors through a common entity is a distinct concern. Whatever efficiencies may be thought likely where a single entrepreneur makes decisions for a corporate entity (or set of connected entities), the presumption is relaxed—and may in some contexts be

reversed—where separate entrepreneurial interests can collaborate; the fixing of above market prices by sellers is the paradigm.[5] This does not make MLS a mere front for price fixing, but it does distinguish *Copperweld* by introducing a further danger and a further argument for testing it under section 1's rule of reason.

To sum up, the present case is not *Copperweld* but presents a more doubtful situation; MLS and its operator/investors comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors. And, of course, there is not one kind of hybrid but a range of possibilities (imagine the operator/investors with their separate entrepreneurial interests but without their control of MLS). The question is what legal approach to take.

The law at this point could develop along either or both of two different lines. One would expand upon *Copperweld* to develop functional tests or criteria for shielding (or refusing to shield) such hybrids from section 1 scrutiny for intra-enterprise arrangements. This would be a complex task and add a new layer of analysis; but where the analysis shielded the arrangement it would serve to cut off similarly difficult, intrusive scrutiny of such intra-enterprise activities under extremely generalized rule of reason standards.[6] It would

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[5] A less vivid but closer parallel is a situation in which dealers or franchises, by control or coercion, make the manufacturer or franchiser impose on them restrictions that the dealers or franchisees select. *See United States v. Topco Assocs.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *United States v. Sealy*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *General Leaseways v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir.1984); *see also* XII Hovenkamp, *Antitrust Law* ¶ 2033b (1999).

[6] There is some, although not a lot of, circuit case law that looks in this direction. *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274-77 (8th Cir.1988); *see also Chicago Prof'l Sports*, 95 F.3d at 598.

also prevent claims, clearly inappropriate in our view, under *per se* rules or precedents dealing with arrangements between existing independent competitors.

The other course is to reshape section 1's rule ofreason toward a body of more flexible rules for interdependent multi-party enterprises. Sports leagues are a primary example but so are common franchising arrangements and joint ventures that perform specific services for competitors (*e.g.*, a common purchasing entity, *see Northwest Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985)). Certainly the trend of section 1 law has been to soften *per se* rules and to recognize the need for accommodation among interdependent enterprises.[7]

The same choice of approach presents itself in franchise cases. There, too, we have a close but not complete integration of separate entities under separate entrepreneurial control. Traditionally, vertically imposed arrangements restricting competition among franchisees have been tested (and often upheld) under the rule of reason. *E.g., Am. Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230, 1241-43 (3d Cir. 1975); *see also* 1 Glickman, *Franchising* § 4.03[2] (2001); XII Hovenkamp, *Antitrust Law* ¶ 2033 (1999). Yet since *Copperweld*, several district court decisions have avoided the section 1 inquiry by deeming franchiser and franchisee part of a single entity.[8]

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[7] *E.g., NCAA v. Bd. of Regents*, 468 U.S. 85, 100-103, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir.1988); *Los Angeles Mem'l Coliseum*, 726 F.2d at 1387; *N. Am. Soccer League*, 670 F.2d at 1258-59; *Smith*, 593 F.2d at 1177-81; *Mackey*, 543 F.2d at 619-20.

[8] The criteria suggested in these cases are so general and so various (unity of interest, lack of existing competition, extent of control), as to emphasize the lack of any developed body of law. *See Search Int'l, Inc. v. Snelling & Snelling*, 168 F.Supp.2d 621, 624-26 (N.D.Tex.2001); *St.*

Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases. To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law. Indeed, the best arguments for upholding MLS's restrictions—that it is a new and risky venture, constrained in some (perhaps great) measure by foreign and domestic competition for players, that unquestionably creates a new enterprise without combining existing competitors—have little to do with its structure.

In all events, we conclude that the single entity problem need not be answered definitively in this case. The case for expanding *Copperweld* is debatable and, more so, the case for applying the single entity label to MLS. But even if we assume that section 1 applies, it is clear to us that the venture cannot be condemned by *per se* rules and presents at best a debatable case under the rule of reason. More significantly, as structured by plaintiffs themselves, this case would have been lost at trial based on the jury's rejection of plaintiffs' own market definition.

The rejection of the *per se* rule is straightforward. Although players portray MLS as a sham for horizontal price fixing, the extent of real economic integration is obvious. Further, MLS and its investors did not compete previously; the arrangement was formed as a risky venture against a background of prior failure, *cf. United States v. Jerrold Elecs. Corp.*, 187 F.Supp. 545, 556-68 (E.D.Pa.1960), *aff'd*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961); and the

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Martin v. KFC Corp., 935 F.Supp. 898, 906 (W.D.Ky.1996); *Hall v. Burger King Corp.*, 912 F.Supp. 1509, 1548 (S.D.Fla.1995); *Williams v. Nevada*, 794 F.Supp. 1026, 1030-32 (D.Nev.1992), *aff'd*, 999 F.2d 445 (9th Cir.1993) (per curiam).

outcome has been to add new opportunities for players—a Division I soccer league in the United States—and to raise salaries for soccer players here above existing levels.

The possibility that a less integrated and restrictive salary regime might make some individual salaries even higher is hardly conclusive. Without the restrictions, MLS might not exist or, if it did, might have larger initial losses and a shorter life. This would hardly enhance competition. Thus, the effects of the MLS arrangement are simply too uncertain to warrant application of the *per se* rule. *NCAA v. Bd. of Regents,* 468 U.S. at 100-103, 104 S.Ct. 2948. As in any other non-*per se* case, players would have to show that MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market and that on balance the adverse effects on competition outweighed the competitive benefits. *See Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 49 (1st Cir.2001).

Here, the jury said that neither the United States nor Division I delimited the relevant market—findings that imply that MLS faced significant competition for player services both from outside the United States and from non-Division I teams. That inference at a minimum creates uncertainty as to whether the jury could have found market power under section 1. However, the peculiar assemblage of evidence, including MLS-authored materials suggesting that it expected to exercise some control over player salaries (*see* Part III below), makes it impossible to rule out abstractly the possibility of a jury finding of MLS market power in a broader market.

MLS has urged that the jury verdict rejecting the United States/Division I market urged by plaintiffs should be preclusive. The argument purportedly rests on the doctrine of collateral estoppel. We agree with the plaintiffs that collateral estoppel goes no further than to preclude them at a

new trial from urging the market already rejected by the jury. *Restatement (Second) of Judgments* §§ 27-28 (1982). In theory, there may be a broader market which plaintiffs might show (without contradicting the jury findings) in which unrestricted salary competition between the MLS operator/investors might result in somewhat higher player salaries. In that event, assuming that the single entity defense failed, a basis for liability might exist.

However, we have been given no reason to think that any other market would have been alleged and made the subject of proof if the section 1 claim had gone to trial along with the section 2 claims. In their complaint, the plaintiffs' main theory under count I was that MLS operated as a price-fixing or group boycott conspiracy for which no market power needed to be shown. A relevant market was nevertheless alleged in count I, apparently because the plaintiffs recognized that a pro-competitive purpose might be urged and a rule of reason balancing might be required. That relevant market was described by count I, as in the section 2 and section 7 counts, as competition for Division I soccer players in the United States. *See* Plaintiffs' First Amended Complaint ¶¶ 32, 59, 70, 78.

Proof of such a market was the consistent theme of plaintiffs' section 2 trial evidence. To be sure, had the section 1 claim been put to trial, the plaintiffs could have sought to amend their complaint to allege a different market, but there is no obvious reason to think that they would have done so. The United States/Division I theory alleged in the complaint was the most favorable for each of their claims and the easiest to define; and the focus on a single market theory would have allowed the plaintiffs to focus their proof on a single market definition. Plaintiffs did have some incentive

to allege a broader market under sections 1 and 7,[9] but that incentive existed when they filed their complaint as well.

Even if the players had sought to amend their complaint after summary judgment, we have great doubt whether such an amendment would have been permitted. *See Acosta-Mestre v. Hilton Int'l of P.R., Inc.*, 156 F.3d 49, 51-52 (1st Cir.1998). The district court granted summary judgment in April 2000—more than three years after the initial complaint was filed, more than one year after discovery was largely complete, and barely five months before beginning of trial. At that point in the proceedings, adding a new market theory would have substantially altered the contours of the case—potentially requiring new discovery and expert analyses based on the new alleged market.[10]

We thus have every reason to think that if the section 1 claim had not been dismissed on summary judgment it would have been presented at trial with the same market analysis alleged in the complaint. It follows that had the district court allowed the section 1 claim, it too would have been defeated by the jury's finding that market alleged in the complaint had not been proved. Accordingly, any error in dismissing the claim based on a single entity theory was harmless so long as the jury verdict stands, a matter we address in the next

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[9] Whereas section 2 requires monopoly power or a prospect of it, significant market power is enough to trigger section 1's rule of reason approach; similarly, something less than monopoly power is required to condemn mergers under section 7's "substantially lessen competition" test. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 27 n. 11 (3d Cir.1978).

[10] Indeed, by June 1999, players' economic expert, Roger Noll, had concluded that the relevant market was limited to U.S. Division I soccer; he did not attempt to define any alternative market, nor did he suggest that MLS might exercise market power in some broader market.

section. The outcome, as the plaintiffs shaped their own case, would have been the same. *Liberty Mut. Ins. Co. v. Metro. Life Ins. Co.*, 260 F.3d 54, 62 (1st Cir.2001).

III. SHERMAN ACT *SECTION 2*

At trial, players alleged three possible violations of section 2: that MLS monopolized the market for Division I professional soccer in the U.S.; that it attempted to monopolize that market; and that it conspired with the USSF to monopolize the same market. The jury found that players had failed to establish the relevant market as alleged; it reached no other issue in the case. The court thereafter entered judgment for the defendants on all three section 2 claims.

Monopolization and attempted monopolization claims. At the outset, players contend that the district court erred by refusing to allow them, in their monopolization and attempted monopolization claims, to argue that elimination of competition for players was an anticompetitive means of monopolization. The district court did so on the ground that this argument would simply resurrect the section 1 claim that had already been rejected by its single entity ruling; section 2 remained available to attack the exclusivity arrangement between MLS and the USSF, which was the gravamen of the complaint's section 2 count. Players respond that the same conduct may constitute an element of both antitrust claims.

To show monopolization, players had to prove that MLS had engaged in an act that helped create or maintain its alleged monopoly. III Areeda & Hovenkamp, *Antitrust Law* ¶ 650a (rev. ed.1996). In section 2 cases, the wrongful act is usually one designed to exclude competitors from the market (e.g., predatory price, exclusive dealing). *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n. 32, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). If MLS and its operator/investors are viewed as a single competitor, then the league's centralized hiring structure hardly constitutes an

exclusionary act, even if it results in below-market wages for players. *See Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir.1984). After all, suppressing player salaries ought to spur, rather than impair, competition from rival leagues.

However, if the operator/investors are viewed instead more as individual potential competitors—an issue that we (unlike the district court) have not decided—it is not difficult to see how an agreement among them not to compete—a mirror image of players' section 1 claim—might create a monopsony and eliminate competition among them. *See* III Areeda & Hovenkamp, *supra,* at ¶ 703a. Such an act would arguably "exclude" competition for purposes of section 2, even if it did not harm individual competitors. Anyway, "exclusion" is only a gloss on the statutory term "monopolize"; and "merger to monopoly," benign as to the merged competitors, is a feasible section 2 claim, *see Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir.1972), even if it is more often challenged under Clayton Act section 7, which requires much less.

Nonetheless, the jury's findings remain as an obstacle. Attempt and monopolization both require a showing that a market has been or may well be subject to monopoly power, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 457-58, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993); the only market alleged by the players was rejected by the jury; and this dooms the players' section 2 claims regardless of which practice—the exclusive arrangement with the USSF or the agreement not to compete for players—is alleged to satisfy the exclusionary act element of the cause of action. This assumes, however, that the jury verdict stands.

Not surprisingly, players next shift their focus to the jury verdict. They say the jury's market findings were tainted by several trial errors. We review the jury instructions *de novo, Ponce v. Ashford Presbyterian Cmty. Hosp.*, 238 F.3d 20, 24

(1st Cir.2001), and the court's evidentiary rulings for abuse of discretion unless (as is occasionally true) an issue of abstract law is presented, *United States v. Sposito*, 106 F.3d 1042, 1046 (1st Cir.1997).

First, players say the court's instructions to the jury on how to define the relevant market were inaccurate and misleading. Players claim the instructions left the jury unable to weigh the significance of evidence showing that some MLS players had employment opportunities in other leagues. For example, MLS offered testimony that its players had played in 67 different foreign leagues, prior to or after playing for MLS; plaintiffs countered that the opportunities were more limited and less attractive than MLS claimed.

Specifically, plaintiffs complain that the district court refused to give two requested instructions: first, that the jury in defining the relevant market "should consider whether any effective competition significantly restrains MLS's ability to control wages for its players"; and second, that the jury should include in the relevant market only those leagues which are "sufficiently attractive and practically available to a large enough number of MLS players to prevent MLS from having the power to pay wages below competitive market levels."

The first problem is that the plaintiffs did not preserve these two requests by making, as Fed.R.Civ.P. 51 requires, a post-instruction objection "stating distinctly the matter objected to and the grounds of the objection." Plaintiffs did not repeat these two requests in the same words; instead they objected after the charge that the instructions had overemphasized the concept of substitutability at the expense of "other factors" that have been identified in the case law, which plaintiffs' brief in this court says includes "the ability of other leagues to constrain the power of MLS to depress plaintiffs' wages."

Unfortunately, plaintiffs' counsel did not spell out the last quoted objection at the post-charge conference. To refer only to "other factors" obviously does not tell the judge just what previously requested instruction has been omitted or identify the factors claimed to be insufficiently stressed. *Davis v. Rennie*, 264 F.3d 86, 100 (1st Cir.2001). Accordingly, the failure to give the two instructions in question is reviewed only for "plain error"; especially in a civil case this is a very hard test to meet because over and above plain error, it requires a showing both of prejudice and a miscarriage of justice or something of this magnitude. *See id.* at 101.

As it happens, the district court gave standard instructions on market definition which, to a considerable extent, tracked the ABA's model jury instructions in civil antitrust cases. ABA Sample Jury Instructions in Civil Antitrust Cases, at C-6 to C-13 (1999). It defined monopoly power as "the power to pay lower than competitive wages for the services being acquired without having the sellers of those services—the players--turn to another league or team for employment"; and it explained that the geographic market was the geographic area "to which players can turn, as a practical matter, for alternate opportunities for employment as professional soccer players." *Accord United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-61, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961).

The district court could permissibly have enlarged on the issue, explaining (for example) that a foreign league would be more likely part of the market as the number of players who could turn to it increased. But how much to elaborate is largely the discretion of the district court, *Interstate Litho Corp. v. Brown*, 255 F.3d 19, 29 (1st Cir.), *cert. denied*, ___ U.S. ___, 122 S.Ct. 666, 151 L.Ed.2d 580 (2001), and in some respects, the players' more detailed formulation could itself be misleading: MLS could be constrained so long as

enough individual players had *an* alternative foreign league even if an *individual* foreign league would *by itself* attract or be available to only a small number of players.[11]

Next, players claim the court erred in permitting Alan Rothenberg, one of the founders of MLS and former president of the USSF, to testify about a legal opinion received by the USSF while shielding the opinion from discovery or questioning. On direct and then on cross-examination, Rothenberg disclosed without detail that the USSF board had obtained a legal opinion that it was lawful to grant exclusive Division I certification to a single league. At trial, the players sought to discover the opinion or have all references to it struck. The court denied both requests, finding that Rothenberg had not waived the attorney-client privilege by making his brief references.

It is true, as MLS asserts, that the statement was first adduced on direct examination by plaintiffs, and its repetition on cross added nothing new. On the other hand, plaintiffs did not ask the witness whether a legal opinion had been sought or about its contents. The witness, himself a lawyer, more or less volunteered this information. Possibly, the district judge felt that the disclosure, even if not directly invited, was legitimate because otherwise the witness—who had been asked whether antitrust concerns had been raised by the USSF board—would have been forced to leave the impression that they had been raised but not seriously addressed or resolved.

We think that if defense counsel had adduced this disclosure in the first instance it would be unfair to allow the legal opinion to be used affirmatively without allowing plaintiffs to examine it or, at the very least, requiring a severe

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[11] It is well-settled that a party claiming that an instruction should have been given forfeits the objection if the instruction it tenders is itself objectionable. *See Savard v. Marine Contracting, Inc.*, 471 F.2d 536, 540 (2d Cir.1972).

limiting instruction (which plaintiffs did not request). The case law is mixed as to whether there is a waiver of the privilege where there is a very limited disclosure as to the ultimate opinion without a disclosure of contents and the answer may depend upon context.[12] But on our facts, it is fairly arguable that the plaintiffs opened the door to the response and, if so, could not use their own conduct to force the waiver.

So viewed, the district court's decision is tested under an abuse of discretion standard, and we are unwilling to say that the decision here was an abuse. Whatever discomfort we feel—and there is some—is assuaged by our grave doubt that Rothenberg's disclosure of the opinion as to lawfulness could have had any effect on a jury verdict that plaintiffs had failed to prove the relevant market they alleged. Plaintiffs make a stab at showing prejudice by equating the failure to prove the relevant market with lawfulness; but although this might be plausible in the abstract, the notion that the jury decided an essentially factual issue, as to which there was a mass of conflicting evidence, on the basis of a brief reference to a legal opinion seems to us highly remote.

Next, players say the court erred in excluding two pieces of documentary evidence that supported their claims of market definition and market power. The first is a September 1994 correspondence between Clark Hunt, a prospective MLS operator/investor, and Mark Abbott, an executive working on the formation of MLS, regarding assumptions made in a financial model disseminated by the league's organizers. Hunt later became an operator/investor in the league through a firm he helped form, which was a defendant below; Abbott became a senior league officer.

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[12] *See United States v. Desir*, 273 F.3d 39, 45-46 (1st Cir.2001); *Frontier Ref., Inc. v. Gorman-Rupp*, 136 F.3d 695, 704 (10th Cir.1998); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir.1994).

In his letter, Hunt urged that the team player salary budget be reduced by $70,000, with the "bulk of the reduction" coming from the "bottom 12 players on each team whose only alternative is to play in one of the other U.S. professional leagues or one of the lower division foreign leagues." Hunt also suggested that salary growth should also be limited to five percent a year, reasoning that "[u]ntil there is significant domestic-based competition for MLS players, the rate of salary growth should be relatively easy to contain." In response, Abbott cautioned that "a reduction of $70,000 in player salaries per team [would] impact the quality of players we are able to attract." At the same time, he agreed that, "for modeling purposes the player salaries should be held to [a] 5% [increase] per year."

The court excluded the correspondence, finding it irrelevant since it was not "made by someone who matters to the case" and the transcript then reveals a four-page colloquy in which the parties argue about the issue with the judge. Plaintiffs' main basis for urging admission of the Hunt letter was that it tended to show Hunt's own intent to monopolize, the suggestion being that this view should also be attributed to the firm that Hunt formed (apparently later) which became an operator/investor and defendant in the case. On this appeal, plaintiffs switch grounds and urge that the Hunt letter and Abbott's reply as well were evidence of plaintiffs' proposed market definition.

Whether the evidence should have been admitted to show intent on the attempt to monopolize claim is a nice issue but irrelevant here since the jury resolved the case on market definition grounds. Plaintiffs' present claim that the evidence should have been admitted to bolster their market theory and show the existence of monopoly power founders because it was never offered for that purpose. *See United States v. Josleyn*, 206 F.3d 144, 154 (1st Cir.2000). Further, although no hearsay objection was made, an interesting question

remains whether Hunt's statement as a prospective investor is properly admissible for either purpose as an admission of the defendant firm that Hunt later helped form. Fed.R.Evid. 801(d)(2).

As to Abbott's letter, it appears from the transcript that the court was prepared to consider admitting the letter without the Hunt document but plaintiffs' counsel understandably demurred. Abbott's statements are quite tame (the first suggests a lack of market power as to quality players and the second was "for modeling purposes"). Plaintiffs' further suggestion—that Abbott was adopting on behalf of MLS whatever was said in the Hunt letter—is a stretch that the language of the letter does not support.

Further, any error was harmless. Players were allowed to introduce numerous other documents, authored by MLS itself, expressing virtually the same opinions. For example, players were allowed to introduce a November 1995 offering memorandum, in which MLS admits that it "does not view [the Division I and Division II or indoor soccer leagues] as significant competition." [13] And at trial, players' economic expert, Roger Noll, relied on these documents to support his testimony and conclusions. The excluded correspondence was thus redundant and could hardly have changed the outcome.

The next piece of evidence is a March 1994 internal memorandum written by two employees of the investment firm Donaldson, Lufkin & Jenrette ("DLJ"). MLS's pro-

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[13] Players also introduced the league's 1993 business plan, in which MLS asserted that it would be able to maintain its salary structure because "[i]t is not anticipated that there will be any other significant domestic professional league to compete for players' services." Another document allowed in evidence, a December 1994 offering memorandum, said "MLS believes it will be able to maintain this salary structure because of the competitiveness of the salary and benefit package and the lack of comparable alternatives in the United States to players."

moters had approached DLJ to act as its financial advisor. In the memo, the DLJ employees conclude that MLS has favorable prospects for success, noting, *inter alia*, that the league will "be able to operate with a strict salary cap," and that there "is a plentiful supply of good American players that have limited professional opportunities to play elsewhere."

The court excluded the memo, first, on hearsay grounds, since it was unclear whether an agency relationship existed at the time the memo was drafted and whether its contents were within the scope of the agency, Fed.R.Evid. 801(d)(2)(D); and second, on relevance grounds, since the views were not attributable to MLS. On appeal, plaintiffs simply do not respond to the claim that at the time the statement was made, DLJ was an independent contractor and not an agent of MLS. *See Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1440 (9th Cir.1990).

In all events, the other documents discussed above which were introduced into evidence contained virtually identical statements penned by MLS itself attesting to MLS's early view that competition in the market was limited. And the DLJ memo, while helpful to players' cause, was hardly dispositive; it addressed only the opportunities of American soccer players and said nothing about the 40% of MLS players who have foreign or dual citizenship and yet are part of plaintiffs' class. By contrast, MLS's own statements which were introduced were more helpful to plaintiffs.

Next, players claim the court erred in permitting a defense witness, Neil Farnsworth, co-owner of a Seattle Division II professional soccer team, to testify that he was competing with MLS for two specific players, while refusing to identify the players by name on "confidentiality" grounds.

At trial, Farnsworth testified that:

> We compete with MLS for players every day. We have a situation right now where I have one player that is

> being courted by MLS. He's rejected one offer by MLS now to stay with us.
>
> . . .
>
> We also have a player from MLS that has played in MLS for probably four years that has contacted us for next season expressing an interest to play for us and then play indoor in addition to playing for us, instead of playing for MLS.

On cross-examination by players' counsel, Farnsworth revealed certain details about the player from his own team, including his salary, but he refused to identify either that player or his MLS recruit by name, claiming he wanted to keep the information confidential. Players' objections were denied; the district court ruled that the players' privacy was at stake, and therefore, that their names were properly excludable under Fed.R.Evid. 403. The court also refused players' request to instruct the jury to ignore the testimony.

Players claim the district court infringed their right to cross-examine Farnsworth and to test the truth of his assertions. To be sure, the court has the authority to "protect witnesses against cross-examination that does little to impair their credibility but that may damage their reputation, invade their privacy, and assault their personality. Rule 403 would permit the protection of even total strangers to the action." 22 Wright & Graham, *Federal Practice and Procedure* § 5215 (1978) (citation omitted); *see* Fed.R.Evid. 611(a). But this power is limited to situations in which the probative value of the evidence is "substantially outweighed" by the danger of unfair prejudice. Fed.R.Evid. 403.

Although much discretion resides in the trial judge in striking this balance, *Gasperini v. Ctr. for Humanities, Inc.*, 149 F.3d 137, 143 (2d Cir.1998), the denial of the names certainly limited plaintiffs' ability to cross-examine Farnsworth and it is unclear to us just what substantial privacy

interest was at stake: if anything, the players would want to shield their names from MLS, but the league knew whom it was courting from Farnsworth's team and the possible defector presumably would in due course use Farnsworth's overtures in bargaining with MLS.

Nonetheless, even without the names, players were able to test Farnsworth's testimony,[14] and other witnesses—including current and former players and soccer officials—testified to player movement between leagues. For example, Ivan Gazidas, MLS's vice president of operations and player relations, testified at length concerning the competition MLS faced to attract the talents of several named players from other leagues. Farnsworth's anecdotal testimony, while somewhat helpful to MLS, was by no means the most powerful evidence adduced at trial to demonstrate inter-league competition. Accordingly, we find the error was harmless.

Finally, players claim the court erred in admitting in evidence a chart summarizing the testimony of two defense witnesses and later permitting the jury to take the chart with them into the jury room for deliberations. The summary chart listed 67 professional soccer leagues of different divisions from 46 countries; at trial, the two witnesses testified that MLS players had experience in each of the leagues and marked the chart accordingly. Both sides used demonstratives at trial which were admitted into evidence; while players complain generally about the use of the demonstratives, this summary chart is the only item they single out on appeal.

In admitting the summaries, the district court reasoned that the demonstratives would "help the jury to think about a

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[14] For example, on cross-examination Farnsworth admitted that he could not be certain whether his player had actually ever received an offer from MLS. Similarly, he admitted he could not be sure whether the MLS player he was recruiting actually had an offer to play in MLS the following season.

complex case." At the same time, it recognized the risks involved, *see Air Safety v. Roman Catholic Archbishop,* 94 F.3d 1, 7 n. 14 (1st Cir.1996), and emphasized in its instructions to the jury that summaries do not "present any independent evidence." It further cautioned them that the summaries are "admitted for your convenience and not to substitute for the full testimony of the witnesses."

It is hard to imagine an issue on which a trial judge enjoys more discretion than as to whether summary exhibits will be helpful. Nothing precludes their use with respect to oral testimony.[15] Here the issues involved in the case and the testimony were complicated and the jury was properly cautioned as to the limited role of summaries. Although the court admitted the charts as "evidence," its instruction made clear that they were merely aids and that the testimony controlled. We find no abuse of discretion and need not concern ourselves with whether, as MLS claims, the objection was somehow waived.

Conspiracy to monopolize. In their third and final section 2 claim, players allege that MLS conspired with the USSF "to prevent any other entity from being sanctioned as a Division I professional soccer league in the United States or otherwise competing against MLS." The court decided that players were required to prove the existence of their relevant market on the conspiracy to monopolize claim; it directed the jury to end its inquiry on all section 2 claims if it found players had failed to prove the existence of their market.

At trial and now on appeal, players say claims of combination or conspiracy to monopolize do not require proof of a relevant market. For these purposes plaintiffs are not distinguishing between the concept of a relevant market and

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[15] *United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979); Fed.R.Evid. 611(a); *see also* 6 *Weinstein's Federal Evidence* § 1006.08[4] (2001).

the concepts of monopoly or market power: they are arguing that the prospect that the alleged conspiracy if successful would achieve monopsony power in a real economic market was irrelevant to their claim. Instead, they say they were required to prove only the existence of the conspiracy; an overt act in furtherance of it; and specific intent to monopolize. *E.g., Salco Co. v. Gen. Motors Co.*, 517 F.2d 567, 576 (10th Cir.1975).

Conspiracy to monopolize claims are not often the subject of much attention, since almost any such claim could be proved more easily under section 1's ban on conspiracies in restraint of trade. IIIA Areeda & Hovenkamp, *Antitrust Law* ¶ 809 (1996). However, a majority of courts that have touched the issue have said, in general terms and often without analysis, that proof of a relevant market, and hence, market power, is not required in a conspiracy to monopolize claim. *E.g., Salco*, 517 F.2d at 576; *see* IIIA Areeda & Hovenkamp, *supra*, at ¶ 809 & n. 2 (collecting cases); ABA Sample Jury Instructions in Civil Antitrust Cases, *supra*, at C-100 n. 3.

On the other side, there are also a number of decisions that say that a relevant market is necessary.[16] That is also the view of the more persuasive commentary, including the most respected of the antitrust treatises. IIIA Areeda & Hovenkamp, *supra,* at ¶ 809; *accord* Comment, *The Relevant Market Concept in Conspiracy to Monopolize Cases under Section 2 of the Sherman Act,* 44 U. Chi. L.Rev. 805 (1977). Although we lean toward this view as a general matter, a black or white rule is not inevitable: there may in principle be some cases in which one could argue that a conspiracy

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[16] *E.g., Doctor's Hosp. of Jefferson, Inc. v. S.E. Med. Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir.1997); *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir.1983); *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1182 (8th Cir.1982); *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F.Supp. 824, 845 (N.D.Ga.1976).

claim should be provable without a showing that the alleged market is a real economic market. This case is not among them.

Here the "conspiratorial agreement" is a garden variety exclusive dealing arrangement limited to three years. Such agreements are not inherently unlawful; they are judged primarily by considering, in addition to competitive or efficiency justifications, any actual or threatened adverse effects on competition. *Tampa Elec. Co.*, 365 U.S. at 327, 81 S.Ct. 623; *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir.1993). Predicted effects turn, obviously, on the establishment of a market in which the exclusive dealing arrangement may affect prices or competitors. Absent threatened effects, there is normally no basis for condemning an exclusive dealing arrangement.

All implemented exclusive dealing contracts involve both a nominal conspiracy (the agreement) and acts in furtherance (whatever dealings take place). To tell a jury that it may condemn such contracts—without proof of any threatened effect on the market—would create not only confusion for the jury but invite an end run around the threatened effects required by the case law for exclusive dealing under both section 1 and the attempt and monopolization requirements of section 2. IIIA Areeda & Hovenkamp, *supra*, at ¶ 809.

The point is summed up neatly in the Areeda-Hovenkamp treatise:

> Where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for the § 2 conspiracy offense is understandable. *However, in those instances where [market] power is a prerequisite to holding an agreement to be an unreasonable restraint of trade—a joint venture, for example—it would make no sense to hold the same agreement offensive to § 2 without proof of*

> *power.* To require power under § 1 before condemning a particular agreement is necessarily to say that the arrangement is socially desirable, or at least not harmful, in the absence of power. That policy conclusion cannot sensibly be avoided or negated by the simple trick of calling the agreement a conspiracy to monopolize.

IIIA Areeda & Hovenkamp, *supra*, at ¶ 809 (emphasis added).

Where parties agree to achieve an admittedly unlawful result, such as a murder or burglary, there is case law to the effect that the prosecutor need not show that the plan was feasible and that impossibility (at least in some situations) is not a defense. 2 LaFave & Scott, *Substantive Criminal Law* § 6.5(b) (1986); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L.Rev. 922, 944-45 (1959). This is presumably the source of the antitrust case law relied on by plaintiffs. But the rationale of this classic view is that the conspiracy should be punished because the demonstrated intent to break the law shows that the conspirators are dangerous even if this particular venture was impractical. 2 LaFave & Scott, *supra*, at § 6.5(b).

Perhaps this view is equally justified in antitrust cases where the evidence shows that the conspirators were aiming at a demonstrably illegal result, say, a world wide monopoly of gold production or a naked horizontal allocation of markets. In our case, there is no dispute that defendants aimed at being the only Division I soccer league in the United States at least for three years and that they enlisted the USSF to achieve this end. But the illegality of such an arrangement is far from clear. To ignore the question whether this is a relevant market in the economic sense is to assume that the end aimed at is illegal. Here, the jury found that control of U.S./Division I soccer would *not* comprise a monopoly.

In sum, there may be contexts in which the existence *vel non* of a relevant market is beside the point in a conspiracy to monopolize case, but this case is not one of them. The exclusivity agreement sought by MLS might be unlawful if it threatened adverse competitive effects but not otherwise; and this in turn required proof that someone who was the only purchaser of Division I soccer player services in the United States would control prices in an economic market.

IV. CLAYTON ACT SECTION 7

In their final argument, players say that the district court erred in dismissing their claim that the formation of MLS violated section 7 of the Clayton Act. Count IV of the complaint alleged that, "[i]f not for this combination of assets and purchase of stock, MLS Member Teams would compete with each other for players, like teams in all other major professional sports leagues in the United States." Section 7 prohibits, with certain commerce-related conditions, stock or asset acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

The district court granted summary judgment to the defendants on the ground that "[t]here can be no § 7 liability because the formation of MLS did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market." *Fraser,* 97 F.Supp.2d at 140. According to the district court:

> The relevant test under § 7 looks to whether competition in *existing* markets has been reduced. . . . Where there is no existing market, there can be no reduction in the level of competition. There are no negative numbers in this math; there is nothing lower than zero. Competition that does not exist cannot be decreased. The creation of MLS did not reduce competition in an existing market

> because when the company was formed there was no active market for Division I professional soccer in the United States.

Id. at 140-41 (citing *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir.1981)).

Both sides make much of the district court's reference to a "new market." Players say that this contradicts the jury's finding that United States/Division I soccer is not a separate market and, anyway, there is no implied immunity from section 7 for combinations that lessen competition in a new market. Defendants say that the district court merely held the players to the market they themselves alleged and was entitled to do so on summary judgment.

The district court was saying no more than that, after the failure of the NASL and prior to the formation of MLS, there was no enterprise engaged in providing Division I soccer in the United States and thus that a combination that added Division I soccer in this country could hardly reduce competition where none before existed. This is plainly correct insofar as the creation of MLS added a new entrant without subtracting any existing competitors. To this extent, the most common threat addressed by section 7—the merger of two or more entities currently competing with one another, *e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)—is not present in this case.

The Supreme Court has recognized that section 7 also reaches mergers that combine an existing competitor with a potential competitor commonly perceived to be a strong potential entrant where the number of such entrants is limited. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 624-25, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32, 93 S.Ct. 1096,

35 L.Ed.2d 475 (1973). In such cases, the notion is that the gobbling up of the "perceived potential entrant" removes an *existing* constraint on competition and thus reduces *present* competitive pressure that may currently be constraining price. *Falstaff*, 410 U.S. at 532, 93 S.Ct. 1096.

The players make no attempt to show that this form of existing competitive constraint was eliminated by the formation of MLS. Rather, their explicit theory is that, if MLS were held unlawful under section 7, its operator/investors would enter the market independently, thus increasing the amount of competition over and above the level provided by MLS itself.

At the outset, the question arises whether section 7 can be used to prevent a merger that itself increases competition where it can be confidently predicted that prevention will or probably will increase competition *even more.* The classic hypothetical is the merger of an existing competitor with a non-competing company whose interest in entry is unknown and so exerts no current pressure on the market as a perceived potential entrant. Yet when its private files are examined incident to a court suit, plans are discovered for independent entry if the merger is disallowed.

The Supreme Court has expressly reserved the question whether section 7 can be read to reach such a case. *Marine Bancorp.*, 418 U.S. at 639, 94 S.Ct. 2856; *Falstaff*, 410 U.S. at 537, 93 S.Ct. 1096. To our knowledge only one circuit has expressly applied section 7 so broadly, *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 978-80 (8th Cir.1981), *cert. denied sub nom. Brunswick Corp. v. FTC*, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 174 (1982), and the district court apparently rejected this view, *Fraser*, 97 F.Supp.2d at 141.

It is uncertain how the Supreme Court will ultimately resolve the issue. Plaintiffs' view bumps up against the most straightforward reading of the phrase "may . . . lessen

competition" in which "competition" is understood to refer to the existing level of competition prior to the merger in question. Further, it is often hard enough to determine whether a merger will reduce competition in relation to a known baseline, namely, existing market conditions. If a new combination will, as here, initially enhance competition, one might hesitate at a further and even more difficult conjecture that prohibiting the transaction would lead to even more competition further down the line.

On the other hand, the antitrust statutes are not always read literally, as *Copperweld* itself demonstrates, *see also Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911) (rule of reason read into restraint of trade). The Antitrust Division, often a significant influence on the development of antitrust case law, seemingly supports a generous reading of Section 7 to embrace so called "actual potential competition." Dep't of Justice Non-Horizontal Merger Guidelines § 4.112, 49 Fed.Reg. 26,824, 26,834 (1984); *accord v. Areeda & Turner, Antitrust Law* ¶ 1118 (1980). And there might be cases where the facts might compel the conclusion that turning down a pro-competitive merger (compared to the status quo) would produce an even more competitive realignment.

That is not this case. Here, there is no possible way to predict just what would happen if the current version of MLS were precluded. Players assert that, had the operator/investors not formed MLS, they would have entered the market as a traditionally structured league. But as the district court noted, it is "not inevitable that the league would be formed and would operate the same way as previous sports leagues." *Fraser*, 97 F.Supp.2d at 142. More importantly, it is quite possible these investors would have found the alternative structures unattractive and simply abandoned their effort altogether—hardly a pro-competitive outcome.

Even the alternative result suggested by players—that another, more traditionally structured league like the APSL would have received the Division I sanction instead—appears on the surface no more pro-competitive. The evidence indicates that the APSL was not as well financed or well managed as MLS (hence the USSF's decision to certify MLS and not the APSL), thus increasing the risk that the new Division I league would fail in the long run. In addition, elevating the APSL to Division I status would not necessarily increase competition significantly, since the APSL, an existing minor league, may have already been in the relevant market.

It might be argued that these objections present issues that a jury ought to consider; but there is one final objection that the jury did effectively consider. Even advocates of a broader reading of section 7 concede that striking down a combination that does not threaten present competition could be justified, in the hope of obtaining more competition in the future, only in already concentrated markets. "In the absence of significant market power in the hands of existing firms, . . . the loss through merger of a potential entrant would not affect present or future competition." V Areeda & Turner, *supra,* ¶ 1119a.

Thus, even on the broader reading of section 7 and allowing room for conjectures about future effects, it would have been necessary for players to prove that MLS operates within a relevant economic market that is presently concentrated. In their section 7 count, the players alleged the same relevant United States/Division I market as in their section 1 and section 2 counts. For reasons already discussed in connection with the section 1 claim, the jury's rejection of this relevant market would also have doomed the section 7 claim based on enhancing future competition if it too had been presented.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 97-10342 (GA0)

IAIN FRASER, *et al.*,

Plaintiffs,

-against-

MAJOR LEAGUE SOCCER, L.L.C., *et al.*,

Defendants.

JUDGMENT

WHEREAS, this action was commenced on February 13, 1997, by the filing of a summons and complaint, amended on August 21, 1998, on behalf of the named plaintiffs and a purported class of all those similarly situated (collectively the "Plaintiff Class"); and

WHEREAS, by order dated January 28, 1998, this Court certified a class with respect to plaintiffs' claims for injunctive relief consisting of all players who either have been, are now, or will be under contract to play professional outdoor soccer for defendant Major League Soccer, L.L.C. ("MLS") on an MLS Member Team at any time from February 13, 1997 to the date of final judgment in this action and any appeal therefrom (the "Injunctive Plaintiff Class"); and

WHEREAS, by order dated April 19, 2000, this Court granted partial summary judgment to defendant MLS and defendants Kraft Soccer, L.P., Anschutz Soccer, Inc., Team Columbus Soccer L.L.C., Team Kansas City Soccer, L.L.C., Los Angeles Soccer Partners, L.P., Empire Soccer Club, L.P.,

Washington Soccer, L.P., Anschutz Chicago Soccer, Inc. and South Florida Soccer, L.P. (the "Investor Defendants") dismissing Counts I and IV of the Complaint as against them; and

WHEREAS, at the close of plaintiffs' case, this Court dismissed Count III of the Complaint pursuant to Fed. R. Civ. P. Rule 50 as against the Investor Defendants; and

WHEREAS, at the close of plaintiffs' case, defendants moved pursuant to Fed. R. Civ. P. Rule 50(a) for judgment as a matter of law dismissing Count III of the Complaint, which motion remained sub judice during the trial, and defendants renewed that motion at the close of the evidence, and this Court having disposed of that motion by Order dated January 19, 2001; and

WHEREAS, following a trial held before a jury in this Court with respect to Count III of the Complaint, a verdict was rendered on December 11, 2000, in favor of defendants MLS and USSF and against both the named plaintiffs and the Injunctive Plaintiff Class; and

WHEREAS, there is no just reason for delaying the entry of final judgment with respect to Counts I, III and IV of the Complaint pursuant to Fed. R. Civ. P. Rule 54(b);

NOW, THERFORE, IT IS ORDERED, ADJUDGED AND DECREED, THAT:

1. The claims of the named plaintiffs and the Injunctive Plaintiff Class under Counts I, III and IV of the Complaint are hereby dismissed as against all defendants, with prejudice.

2. The Clerk of the Court shall tax costs with respect to Counts I, III and IV of the Complaint pursuant to Fed. R. Civ. P. Rule 54(d)(1).

Dated: 01/29, 2001

Hon. George A. O'Toole, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 97-10342 (GA0)

IAIN FRASER, *et al.*,

Plaintiffs,

-against-

MAJOR LEAGUE SOCCER, L.L.C., *et al.*,

Defendants.

ORDER

WHEREAS, a Final Judgment dismissing Counts I, III and IV of the Complaint in this action has been entered by this Court pursuant to Fed. R. Civ. P. Rule 54(b); and

WHEREAS, by Stipulation and Order dated July 28, 1997, Count II of the Complaint was discontinued as against defendant United States Soccer Federation; and

WHEREAS, the parties have agreed that Counts II and V of the Complaint shall be tried to this Court sitting without a jury; and

WHEREAS, the parties, by their counsel, have agreed to hold any further proceedings in this action in abeyance pending any and all appeals from the Final Judgment:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Any claims for damages which could be asserted with respect to the claims set forth in Counts II and V of the Complaint of named plaintiffs Steve Trittschuh, Sean

Bowers, Mark Semioli, Rhett Harty, David Vaudreuil, Mark Dodd and Mark Dougherty are hereby dismissed, with prejudice.

2. Any further proceedings in connection with the claims set forth in Counts II and V of the Complaint are hereby held in abeyance until all available appellate procedures with respect to the Final Judgment dismissing Counts I, III and IV of the Complaint have been exhausted.

Dated: 01/29, 2001

Hon. George A. O'Toole, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

[Filed April 19, 2000]

Civil Action No. 1:97CV10342GAO.

IAIN FRASER; STEVE TRITTSCHUH; SEAN BOWERS; MARK SEMIOLI; RHETT HARTY; DAVID SCOTT VAUDREUIL; MARK DODD; AND MARK DOUGHERTY,
Plaintiffs,

v.

MAJOR LEAGUE SOCCER, L.L.C.; KRAFT SOCCER, L.P.; ANSCHUTZ SOCCER, INC.; ANSCHUTZ CHICAGO SOCCER, INC.; SOUTH FLORIDA SOCCER, L.L.C.; TEAM COLUMBUS SOCCER, L.L.C.; TEAM KANSAS CITY SOCCER, L.L.C.; LOS ANGELES SOCCER PARTNERS, L.P.; EMPIRE SOCCER CLUB, L.P.; WASHINGTON SOCCER, L.P.; AND UNITED STATES SOCCER FEDERATION, INC.,
Defendants.

MEMORANDUM AND ORDER

O'TOOLE, *District Judge*.

The individual plaintiffs are the representatives of the certified class of professional soccer players who are or who have been employed by the defendant Major League Soccer, L.L.C. ("MLS"). MLS is a limited liability company ("LLC") organized under Delaware law. *See generally* Del.Code Ann. tit. 6, §§ 18-101, *et. seq.* (1996). The defendant United States Soccer Federation, Inc. ("USSF") is the national governing body for professional and amateur soccer in the United States.

All the other defendants are investors in MLS, each a capital-contributing member of MLS that has contracted with MLS to operate one or more of MLS's teams.[1]

The plaintiffs assert a number of antitrust claims. In Count I, they allege that MLS and several of its investors who operate MLS teams (hereafter "operator-investors" or "operators") have unlawfully combined to restrain trade or commerce in violation to § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, by contracting for player services centrally through MLS, effectively eliminating the competition for those services that would take place if each MLS team were free to bid for and sign players directly. In Count II, the plaintiffs assert as a second § 1 claim that all the defendants have conspired to impose anticompetitive "transfer fees" on player relocation that have the effect of restricting the ability of soccer players to move from one team to another, thus dampening competition for players' services worldwide. Count III alleges that all defendants have jointly exercised monopoly power in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. In Count IV, the plaintiffs allege that the transaction which brought MLS into existence violated § 7 of the Clayton Act, 15 U.S.C. § 18. Finally, the plaintiffs assert in Count V a California state law claim that certain contracts concerning players' promotional rights were unlawful contracts of adhesion. The plaintiffs seek declaratory and injunctive relief as well as damages.

The plaintiffs have moved for summary judgment as to the defendants' so-called "single entity" defense. (Answer to Am. Compl., First Aff. Def.) The gist of their argument is that although MLS appears to be a single business entity, so that its method of hiring players centrally can be characterized as the act of a single economic actor for antitrust purposes, the organizational form is really just a sham that should be

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[1] MLS and its members may sometimes hereinafter be referred to collectively as the "MLS defendants."

considered ineffective to insulate from condemnation what are in substance illegal horizontal restraints on the hiring of players resulting from the unlawful concerted behavior of the several MLS team operators. The MLS defendants have filed a cross-motion for summary judgment in their favor dismissing Count I, arguing that MLS, as a single entity, cannot commit a § 1 violation. The MLS defendants have also moved for summary judgment on Count IV, the plaintiffs' Clayton Act claim.

I. RELEVANT FACTS

The following material facts are not subject to genuine dispute. At the time MLS was formed, no "Division I" or "premiere" professional outdoor soccer league operated in the United States. The last premiere soccer league to operate in this country had been the North American Soccer League ("NASL"), which led a turbulent existence from 1968 until the mid-1980s, when it collapsed. In 1988, Federation Internationale de Football Association ("FIFA") awarded to the United States the right to host the 1994 World Cup, soccer's illustrious international competition. In consideration for that award, the organizers of the event promised to resurrect premiere professional soccer in the United States.

In the early 1990s, Alan Rothenberg, the President of USSF and of World Cup USA 1994, with assistance from others began developing plans for a Division I professional outdoor soccer league in the United States. Rothenberg and others at the USSF consulted extensively with potential investors in an effort to understand what type of league structure and business plan they might find attractive. He also consulted antitrust counsel in the hope of avoiding the antitrust problems which other sports leagues such as the National Football League ("NFL") had encountered. Eventually the planners settled on the concept of organizing a limited liability company to run the league, and in 1995 MLS was formed.

The structure and mode of operation of MLS is governed by its Limited Liability Company Agreement ("MLS Agreement" or "Agreement"). The MLS Agreement establishes a Management Committee consisting of representatives of each of the investors. The Management Committee has authority to manage the business and affairs of MLS. Several of the investors have signed Operating Agreements with MLS which, subject to certain conditions and obligations, give them the right to operate specific MLS teams.[2] There are also passive investors in MLS who do not operate teams. None of the passive investors is a defendant here.

Operator-investors do not hire players for their respective teams directly. Rather, players are hired by MLS as employees of the league itself and then are assigned to the various teams. Each player's employment contract is between the player and MLS, not between the player and the operator of the team to which the player is assigned. MLS centrally establishes and administers rules for the acquisition, assignment, and drafting of players, and all player assignments are subject to guidelines set by the Management Committee. Among other things, the guidelines limit the aggregate salaries that the league may pay its players.

Under applicable player assignment policies, MLS centrally allocates the top or "marquee" players among the teams, aiming to prevent talent imbalances and assure a degree of comparability of team strength in order to promote competitive soccer matches. These assignments are effective unless disapproved by a two-thirds vote of a subcommittee of the Management Committee. Most of the rest of the players—the non-"marquee" players—are selected for teams by the individual operator-investors through player drafts and the like. The league allows player trades between teams, but

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[2] The league itself is authorized by the MLS Agreement to operate teams directly and currently operates two teams (the Dallas Burn and the Tampa Bay Mutiny).

MLS's central league office must approve (and routinely does approve) such trades. Team operators are not permitted to trade players in exchange for cash compensation.

MLS distributes profits (and losses) to its investors in a manner consistent with its charter as a limited liability company, not unlike the distribution of dividends to shareholders in a corporation. Revenues generated by league operations belong directly to MLS. MLS owns and controls all trademarks,[3] copyrights, and other intellectual property rights that relate in any way either to the league or to any of its teams. MLS owns all tickets to MLS games and receives the revenues from ticket sales. There are central league regulations regarding ticket policies, even including limits on the number of complimentary tickets any team may give away. Team operators do retain the ability to negotiate some purely local matters, including local sponsorship agreements with respect to a limited array of products and services and local broadcast agreements, but they do so as agents of MLS.

Under the Operating Agreement, each team operator receives from MLS a management fee. As of the time this action was filed, the management fee consisted of (a) 100% of the first $1.24 million, and 30% of the excess over $1.24 million, of local television broadcast and sponsorship revenues, the latter percentage subject to some specified annual increase; (b) 50% of ticket revenues from home games, increasing to 55% in year six of the league's operation; and (c) 50% of stadium revenues from concessions and other sources.

Expenses are allocated in a way similar to the allocation of revenues. MLS is responsible for most expenses associated with league operations. For example, MLS pays all player acquisition costs, player salaries, and player benefits. It also pays the salaries of all league personnel (including referees),

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[3] Operators retain security interests in team trademarks.

game-related travel expenses for each team, workers' compensation insurance, fees and expenses of foreign teams playing in exhibition games promoted by MLS within the U.S., league-wide marketing expenses, and 50% of each individual team's stadium rental expense.

The team operators are responsible for the other half of their stadium rents, costs of approved local marketing, licensing, and promotion, and general team administration, including salaries of the team's management and coaching staff.

Passive investors do not pay any team operating expenses or receive any management fee. They share in the general distribution of profits (and losses) resulting from league operations.

Team operators cannot transfer their MLS interests or operational rights without the consent of the Management Committee. That consent may be withheld without cause, but the league is required to repurchase the team operator's interest at its fair market value if approval is withheld. Team operators derive whatever rights they may have exclusively from MLS, and the league may terminate these rights if a team operator violates these provisions or fails to act in the best interest of the league.

II. THE MLS MOTION FOR SUMMARY JUDGMENT

I first consider the defendants' motion for summary judgment. Summary judgment may be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict

for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). That an antitrust claim may be factually and legally complex does not necessarily preclude the entry of summary judgment; there is no heightened standard for summary judgment in complex cases. *See Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 541 (2d Cir.1993) (antitrust); *City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274 (8th Cir.1988) (same); *see also Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1159 (1st Cir.1994) (complex cases generally).

Most of the material facts necessary to decide the defendants' motion are undisputed. One possibly material fact that is disputed is the definition of the relevant market for purposes of the § 1 analysis. In evaluating the defendants' motion, I assume that the relevant market is the market for Division I professional outdoor soccer in the United States, which is the plaintiffs' position. In addition, the plaintiffs are entitled to all reasonable inferences from the undisputed facts.

III. THE OPERATION OF MLS

Section 1 of the Sherman Act forbids contracts, combinations, and conspiracies in restraint of trade or commerce. *See* 15 U.S.C. § 1. Agreements between separate economic actors that have the effect of substantially and unreasonably reducing competition in a particular market violate § 1. The plaintiffs argue that MLS player policies constitute an unlawful agreement among the various team operators to limit or eliminate competition in the market for players' services.

Though the language of § 1 is sweeping, there are some limits to its reach. One critical limitation for the purposes of this case is that the statute does not prohibit single economic entities from acting unilaterally in ways that may, in some manner, decrease competition. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79

L.Ed.2d 775 (1984). Because it is directed against contracts, combinations or conspiracies, § 1 only prohibits collective activity by plural economic actors which unreasonably restrains competition. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit."); *Mount Pleasant*, 838 F.2d at 274 ("A conspiracy requires a plurality of actors. . . ."). The MLS defendants contend that MLS is a "single entity" and that even if its policies and practices have the effect of substantially reducing competition for players' salaries, they do not—*cannot* as a matter of law—violate § 1.

MLS is a limited liability company organized under Delaware law. An LLC is a form of statutory business organization that combines some of the advantages of a partnership with some of the advantages of a corporation.[4] Under Delaware law, an LLC is a separate legal entity distinct from its members. Del.Code Ann. tit. 6, § 18-201(b). As in a corporation, investors (shareholders in a corporation, members in an LLC) have limited liability (*id.*, § 18-303), own undivided interests in the company's property (§ 18-701), are bound by the terms of their Agreement (like the corporate Articles), and share in the overall profits and losses ratably according to their investment or as otherwise provided by the organizing Agreement (§ 18-503). The Federal Trade Commission has treated LLCs like corporations. *See In re Monier Lifetile L.L.C.*, No. 9290 (F.T.C. Mar. 1999) (characterizing Monier Lifetile as a corporation); *In re Merck & Co.*, No. C-3853 (F.T.C. Feb. 18, 1999) (treating Merck-Medco Managed Care L.L.C., as a corporation); *In re Shell Oil Co.*, No. C-3803 (F.T.C. Apr. 21, 1998) (analyzing joint venture

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[4] Both corporations and partnerships are strongly presumed to be single entities for the purposes of § 1. *See* Philip E. Areeda, *Antitrust Law* ¶ 1476d (1986).

LLC in same manner as joint venture corporation).[5] In the present context, there is little reason to treat an LLC such as MLS differently from a corporation.

MLS's operations should therefore be analyzed as the operations of a single corporation would be, with its operator-investors treated essentially as officers and shareholders. There can be no § 1 claim based on concerted action among a corporation and its officers, nor among officers themselves, so long as the officers are not acting to promote an interest, from which they would directly benefit, that is independent from the corporation's success. *See Copperweld*, 467 U.S. at

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[5] In addition, some courts have held, in non-antitrust contexts, that LLCs more closely resemble corporations than partnerships. *See Exchange Point LLC v. U.S. S.E.C.*, No. M-30, 1999 WL 386736, at *3 (S.D.N.Y. June 10, 1999) (finding LLC to be more similar to wholly owned corporation than partnership and thus not a person for the purposes of the Right to Financial Privacy Act of 1978); *Poore v. Fox Hollow Enterprises*, 1994 WL 150872, at *2 (Del.Super.Ct. March 29, 1994) (LLCs sufficiently resemble corporations such that the same rules which require Delaware corporations to retain Delaware counsel to represent them in state courts also apply to LLCs.).

Admittedly, these decisions do not conclusively determine the matter, since the question whether an organization may be liable for a conspiracy in restraint of trade is different from the questions these cases addressed. *See Bell Atlantic Bus. Systems Servs. v. Hitachi Data Sys. Corp.*, 849 F.Supp. 702, 707 (N.D.Cal.1994) ("Plaintiff's attempt to equate [Sherman Act] § 1 conspiracy liability with alter ego liability fails because § 1 deals with federal antitrust policies and the alter ego doctrine is governed by California corporation law. The two legal principles have different purposes and policy considerations."); *compare De Castro v. Sanifill, Inc.*, 198 F.3d 282, 283 (1st Cir.1999) (wholly-owned subsidiary's activities did not confer personal jurisdiction over parent) *with Copperweld*, 467 U.S. at 753, 104 S.Ct. 2731 (no § 1 liability for parent or wholly-owned subsidiary because the two corporations were a single entity for antitrust purposes).

Nonetheless, the cases do illustrate how courts generally understand the LLC structure to be like that of a corporation and generally apply legal rules applicable to corporations to LLCs as well.

770 n. 15, 104 S.Ct. 2731 (dictum); *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir.1974) (defendant, a newspaper publishing corporation, was accused of trying to destroy plaintiff's newspaper through predatory pricing; defendant and its president held capable of conspiring under § 1 because president had a stake in a *third* newspaper which would directly benefit from plaintiff's newspaper's elimination). If an LLC should be considered like a corporation for these purposes, as I conclude it should, then there can be no § 1 violation by reason of concerted action between the LLC as an entity and its members, or between the individual members themselves, unless the members are acting not in the interest of the entity, but rather in their own separate self-interest. The "independent personal stake" exception has not yet been squarely addressed in this Circuit; recognizing the risk that this exception, if left unchecked, might swallow the rule, courts that employ it have done so conservatively. *See, e.g., Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 705 (4th Cir.1991) (limiting the scope of the exception to *Greenville Publishing*'s specific rationale); *Williams v. 5300 Columbia Pike Corp.*, 891 F.Supp. 1169, 1174-75 (E.D.Va.1995) ("narrow" exception applies only if officer acted to serve a self-interest entirely independent of corporation's success).[6]

The plaintiffs argue that even if MLS is deemed a single entity, the divergent self-interests of the operator-investors provides sufficient cause to invoke the independent personal stake exception. The plaintiffs base this argument largely on their assertion that the operator-investors do not truly share in MLS's profits and losses. Instead of owning undivided interests in the league that are not attached to the operation of

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[6] *Egan v. Athol Mem. Hosp.*, 971 F.Supp. 37 (D.Mass.1997), and *Benjamin v. Aroostook Med. Ctr.*, 937 F.Supp. 957 (D.Me.1996), rejected hospital-physician conspiracy claims similar to the one at issue in *Oksanen*. Neither case turned on a square assessment and application of the independent personal stake doctrine.

any given team, they pay certain operating expenses individually and receive management fees from MLS that are calculated in large part according to their local team-generated revenues. Also, they are able to harvest the value of the particular teams they operate by selling their operational rights or, if the Management Committee vetoes the sale, by requiring the league to pay them the fair market value of their investment.

The management fee arrangement exists in addition to, not in place of, the overall profit and loss sharing specified in the Agreement. Indeed, the fact that there are passive investors in MLS is strong evidence that the payment of management fees and assignment of local expenses do not account for all economic risks and benefits associated with the league's operation.

Furthermore, successful local operation of a team benefits the entire league. The league's net revenues, not just the local operator's management fees, increase when more local revenues are generated.[7]

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[7] Any number of businesses, from restaurants to car dealerships to law firms, require their employees and agents to individually assume certain operational costs and reward them with commissions directly tied to individual performance. That such arrangements may reflect incomplete unity of interest is immaterial, *see Chicago Professional Sports*, 95 F.3d at 598 (Complete unity of interest test "would be silly. Even a single firm contains many competing interests."). One would be hard pressed to say that this rather routine business practice scrambles the economic interests within the firm in such a way as to open it up to § 1 scrutiny. *See Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1135 (3d Cir.1995) (company in charge of freight broker's day-to-day operations was paid on percentage of broker's revenue; held that this encouraged efficient operation and made broker and operations company inseparable for § 1 purposes); *Coast Cities Truck Sales v. Navistar Int'l Transp. Co.*, 912 F.Supp. 747, 765 (D.N.J.1995) (truck manufacturer and associated dealerships were single entity even though each dealership operator received bonus tied to dealership's individual performance).

A similar effect is foreseeable in the market for operator-investor shares. Admittedly, unlike undifferentiated shares of stock, the market value of a team operator's investment will not simply reflect an aliquot share of the whole enterprise, but will also reflect in certain respects the success of the local operation. Nonetheless, unlike competition in most markets, where the value of an enterprise would usually be enhanced if its competitors grew weaker, the value of the right to operate an MLS team would be diminished, not enhanced, by the weaknesses of other teams, their operators, and the league as a whole. Management fees and operational rights notwithstanding, every operator-investor has a strong incentive to make the league—and the other operator-investors—as robust as possible. Each operator-investor's personal stake is not independent of the success of MLS as a whole enterprise.

The plaintiffs point to other ways in which the operator-investors compete on and off the field. That teams (and, by extension, their operators) compete playing soccer, and that operators directly hire certain staff, such as coaches, to make teams more capable of on-field heroics, does nothing to assist the plaintiffs.[8] Exciting on-field competition between teams is what makes MLS games worth watching. *Cf. Chicago Professional Sports*, 95 F.3d at 598-99 ("a league with one team would be like one hand clapping"). Game competition, without doubt, is part of the league's entertainment product, not an indicator of divergent economic interests among operators.

On balance, the business organization of MLS is quite centralized. The league owns the teams themselves; dis-

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[8] Giving operators discretion over certain aspects of their duties while withholding it in other areas does not itself reflect disunity of interest. *See Williams v. I.B. Fischer*, 794 F.Supp. 1026, 1031 (D.Nev.1992) (franchiser and franchisees held to be single entity for purposes of restraint on poaching other franchisees' managers; franchisees' control over local pricing decisions did not establish lack of unity of interest).

gruntled operators may not simply "take their ball and go home" by withdrawing the teams they operate and forming or joining a rival league. MLS also owns all intellectual property related to the teams. It contracts for local-level services through its operators, who act on its behalf as agents.[9] Operators risk losing their rights to operate their teams if they breach the governing Agreement. The Management Committee exercises supervisory authority over most of the league's activities. It may reject, without cause, any operator's individual attempt to assign the rights to operate a team.

It is true that MLS is run by a Management Committee that can be controlled by the operator-investors, who constitute the majority of the members of the Committee. It is not remarkable that principal investors can collectively control the governing board of an LLC (or of a corporation). That fact hardly proves that the investors are pursuing economic interests separate from the interests of the firm. The notion that the members of the Management Committee of a single firm violate the antitrust laws when they vote together to maximize the price or minimize the cost of the firm's product is easily rejected.

As a factual matter, therefore, there is insufficient basis in the record for concluding that operators have divergent economic interests within MLS's structure. Even if one draws the most favorable inference on the plaintiffs' behalf, there is no reasonable basis for imposing § 1 liability.

MLS's player policies, in particular, do not call for application of the independent personal stake exception. The

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[9] The plaintiffs argue that the operators, since they sit on MLS's Management Committee, are not MLS agents in this regard. That argument fails. Shareholders—even ones in positions of control—are not disqualified from serving as an agent of the corporation, *see, e.g., Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 275 (1st Cir.1997).

operator-investors benefit from those policies because centralized contracting for player services results in lower salaries. However, that benefit is, in the MLS structure, a derivative one. No operator has an individual player payroll to worry about; the league pays the salaries. Moreover, the MLS investor gets the lower-cost benefit in exchange for having surrendered the degree of autonomy that team owners in "plural entity" leagues typically enjoy. The reason an individual team owner in one of those other leagues is willing to bid up players' salaries to get the particular players it wants is because by paying high salaries to get desirable players, the owner can achieve other substantial benefits, such as increased sales of tickets and promotional goods, media revenues, and the like. The MLS operator-investors have largely yielded that opportunity to the central league office. Plainly, there are trade-offs in the different approaches. The MLS members have calculated that the surrender of autonomy, together with the attendant benefit of lower and more controlled player payrolls and greater parity in talent among teams, will help MLS to succeed where others, notably NASL, failed. That is a calculation made on behalf of the entity, and it does not serve only the ulterior interests of the individual investors standing on their own. It is not an occasion for application of the independent personal stake exception to the general single-entity rule described in *Copperweld.*

The plaintiffs also argue that the structure of MLS is a sham designed to allow what is actually an illegal combination of plural actors to masquerade as the business conduct of a single entity. The plaintiffs do not argue that the structure of MLS as established by the its organizing Agreement is legally defective so that it should not be recognized as a lawful entity under Delaware law. Rather, they say that even if MLS is a legitimate LLC—a legitimate single entity for state law purposes—a court should disregard that legal form in evaluating under antitrust principles whether the

operator—investors are engaged in a horizontal restraint in the market for players' services. To make the argument, the plaintiffs put a reverse spin on the *Copperweld* holding.

Copperweld held that a corporation could not conspire with its wholly owned subsidiary in violation of § 1 because, though the parent and subsidiary were distinct legal entities, the economic reality was that they functioned as a single business enterprise. Cases following *Copperweld* have mainly addressed the question whether to disregard formal distinctions among entities in order to find economic singularity for the purposes of § 1. *See, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir.1994) (NFL, composed of separately owned clubs, not a single entity in the market for ownership of teams);[10] *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 597-600 (7th Cir.1996) (characterizing NBA, composed of separately owned clubs, as a single entity for the purpose of league-wide limitations on locally televising games through "superstations," though expressly withholding judgment as to whether NBA was single entity in other markets, such as player contracting); *Oksanen*, 945 F.2d at 703 (hospital's engagement of legally-distinct medical staff in peer review process not actionable under § 1 because hospital and doctors were behaving as

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[10] The plaintiffs rely heavily on *Sullivan*, which rejected the NFL's argument that its teams had sufficient unity of interest to make the league a single entity under *Copperweld*. *Sullivan* does little to aid the plaintiffs because the NFL, despite certain similarities, is fundamentally different from MLS. The NFL is a confederation fused from agreements among preexisting, independently owned teams; unlike MLS, NFL football clubs do not exist as part of an overarching corporate structure. As explained in the text *infra*, MLS cannot be subjected to the wide- ranging analysis of economic interests that has been applied to the NFL. *United States Football League v. NFL*, 842 F.2d 1335 (2d Cir.1988); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.1984); and *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.1982), are distinguishable for the same reason.

single entity in that context); *Mount Pleasant*, 838 F.2d at 276-77 (electric cooperative composed of legally distinct providers held to be single entity); *Seabury Management, Inc. v. Professional Golfers' Ass'n of Am., Inc.*, 878 F.Supp. 771, 777 (D.Md.1994) (PGA and partially owned regional golf association were, collectively, a single entity); *cf. Brown v. Pro Football, Inc.*, 518 U.S. 231, 248-49, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996) (in collective-bargaining context, the NFL looks "more like a single bargaining employer").

The plaintiffs propose that the "economic reality" test should be applied not only to *ignore* formal legal distinctions between separate corporations as the court did in *Copper weld*, but conversely to *envision* distinctions in what is formally a single legal entity when doing so would accurately describe how the business of the entity actually operates. The argument may have some superficial appeal, but on close examination it appears that it rests on a misconception of the scope of the *Copperweld* principle.

It was noted above that the courts have not given the sweeping language of § 1 its broadest possible effect. The "rule of reason" is an obvious example of a limitation on the literal scope of the statutory language. *See Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (Brandeis, J.) ("[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence").

The *Copperweld* rule similarly limits the reach of the statute's broad language. While concerted action between two separate corporations, one the parent and the other a subsidiary, could literally be described as a "combination" that restrains trade, the Supreme Court concluded that it was not the kind of combination that § 1 was intended to forbid. Like the coordination between a corporation and its unin-

corporated division, an agreement between a parent and its subsidiary did not represent "a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld*, 467 U.S. at 770, 104 S.Ct. 2731. The plaintiffs are correct that the Court was looking to substance, not merely form.

But that does not mean that form is irrelevant. *Copperweld* does not support the proposition that a business organized as a single legal entity should have its form ignored, or its "veil" pierced, so that courts could examine whether participants in the firm have conducted concerted activity that would violate § 1. Merely posing that proposition suggests how troublesome it would be as a practical matter. It would permit the atomization of firms into their constituent parts, then to have the relationships of those parts examined to see if they produced anticompetitive effects that, had they been brought about by independent economic actors, would have violated § 1. The number of companies that could be vulnerable to examination of internal business decisions under such an approach would be mind-boggling. No case has suggested that it would be appropriate to deconstruct a corporate entity in that way.

Practical objections aside, the theory is also fundamentally incompatible with the axiom the *Copperweld* Court's analysis started with—that coordination of business activities within a single firm is not subject to scrutiny under § 1. *Copperweld* cannot be understood to authorize an "economic reality" analysis that would require rejection of the very premise the holding of the case depended on. Moreover, the plaintiffs' proposition would plainly interfere with the objective of the antitrust laws. "Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld*, 467 U.S. at 775, 104 S.Ct. 2731.

In sum, the plaintiffs' deconstruction efforts are unavailing. MLS is what it is. As a single entity, it cannot conspire or combine with its investors in violation of § 1, and its investors do not combine or conspire with each other in pursuing the economic interests of the entity. MLS's policy of contracting centrally for player services is unilateral activity of a single firm. Since § 1 does not apply to unilateral activity—even unilateral activity that tends to restrain trade [11]—the claim set forth in Count I cannot succeed as a matter of law.

IV. THE FORMATION OF MLS

In addition to the claim that the player policies of MLS are an unlawful horizontal restraint of trade, the plaintiffs also claim that the very formation of MLS in the first place violated § 7 of the Clayton Act, which prohibits acquisitions or mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce or activity affecting commerce, 15 U.S.C. § 18, as well as § 1 of the Sherman Act. The two theories are related.

A. *The Clayton Act Claim*

1. *Antitrust Injury*

Only those who have sustained injuries which the antitrust laws were designed to prevent may sue under§ 7 of the Clayton Act. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,*

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[11] *See Copperweld*, 467 U.S. at 776, 104 S.Ct. 2731 ("The appropriate inquiry . . . is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects. . . . Nor is it whether the term 'conspiracy' will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress, as interpreted by the weight of judicial authority").

Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *see also* Philip E. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L.Rev. 1127, 1130-37 (1976). The defendants' first response to the § 7 claim is that the plaintiffs cannot establish an antitrust injury resulting from the formation of MLS. In making this argument, the defendants rely primarily on *Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours and Co.*, 826 F.2d 1235, 1242-43 (3d Cir.1987).

Alberta Gas emphasizes the lesson that the antitrust laws provide remedies only for injury to *competition* itself, and not simply injury to *competitors*. A competitor adversely affected by a transaction that does not actually reduce the level of competition in the relevant market has no remedy under the antitrust laws. If the transaction defeats a competitor's expectations about how the market will evolve, but does not reduce the overall level of competition in the market in some manner injurious to the disappointed competitor, the dashed hopes are not a sufficient basis for an antitrust lawsuit. In *Brunswick*, for example, several independent bowling alley owners sued Brunswick for acquiring and then revitalizing their once-ailing competitors. While these acquisitions thwarted a potentially advantageous market consolidation anticipated by the independent alley owners, there was no injury to competition itself. In fact, the revitalization of former competitors caused an increase in competition, and it was actually the prospect of greater competition which threatened to injure the plaintiffs. That was not an antitrust injury. *See Brunswick*, 429 U.S. at 488, 97 S.Ct. 690.

The principle is not entirely apt here. The plaintiffs are not simply suing on dashed hopes of a windfall, as the plaintiffs in *Brunswick* were. The new Division I soccer league the World Cup promoters promised to create could have been structured in the same way other sports leagues had

been structured: a number of independently owned teams collaborating in certain aspects but competing with one another for player services. Clearly, compared to this traditional form of sports league, MLS's structure reduces competition for player services. The claim does assert an injury to competition cognizable under the antitrust laws.

2. *Existing Market*

Unfortunately for the plaintiffs, the claim is not otherwise viable. There can be no § 7 liability because the formation of MLS did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market. The relevant test under § 7 looks to whether competition in *existing* markets has been reduced. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320-22, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (§ 7 is a means for preventing the reduction of competition in existing markets); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1210-11 (2d Cir.1981) (dismissing plaintiff's claim that acquisition of plain paper copying patents was a § 7 violation because, at the time of the acquisition, no market existed for plain paper copying). Where there is no existing market, there can be no reduction in the level of competition. There are no negative numbers in this math; there is nothing lower than zero. Competition that does not exist cannot be decreased. The creation of MLS did not reduce competition in an existing market because when the company was formed there was no active market for Division I professional soccer in the United States.

The plaintiffs try two avenues around this obstacle to their claim. First, they argue that § 7 is designed to arrest anti-competitive transactions in their incipiency, *see United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964), so that it must apply not only to transactions that reduce existing competition, but includes also those transactions intended to stifle reasonably antici-

pated "potential competition." *See Tenneco, Inc. v. Federal Trade Comm'n*, 689 F.2d 346, 352 (2d Cir.1982); *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971, 977-78 (8th Cir.1981).

The plaintiffs' reliance on the potential competition doctrine as explained in *Penn-Olin* and *Yamaha* is misplaced. In *Penn-Olin*, a vertical joint venture between two major participants in the sodium chlorate market was held to be subject to § 7 scrutiny. Similarly, in *Yamaha*, the Eighth Circuit applied § 7 to evaluate a proposed venture between the country's second largest seller of outboard motors and a major foreign producer that had not yet sold products here but had the ability to do so and concluded that the potential anticompetitive results of the venture were impermissible. In both cases, there was an existing, established relevant market, and the asserted violation was the preemption of likely competition in that market by the anticipatory acquisition of the potential competitors. The businesses already existed; it was the competition between them that was only "potential." Indeed, *Yamaha* cautions that the potential competition doctrine is limited to "acquisitions by a large firm in an oligopolistic market, if the acquisition eliminate[s] the acquired firm as a potential competitor, and if the acquired firm would otherwise have been expected to enter the relevant market de novo." *Yamaha* 657 F.2d at 977. *Accord Tenneco*, 689 F.2d at 352 (characterizing actual potential competitor doctrine as barring mergers that might increase oligopolistic behavior in existing markets). In the present case, both the market for Division I professional soccer in the United States and the existence of any competitors in that market were only "potential" until the transaction that formed MLS occurred. The "potential competition" doctrine does not apply in these circumstances.

The plaintiffs further argue that, even though no one was playing Division I soccer in the United States at the time MLS was created, the market nevertheless existed because

the World Cup promoters had promised FIFA that a premiere soccer league would be established in the United States. As a result of the promise, they say, it was inevitable that there would be such a league. The operator-investors in MLS, therefore, would likely have been competitors in a traditional soccer sports league. The formation of MLS thwarted that prospective competition, violating § 7.

The expected market for Division I professional soccer in the United States at the time MLS was formed was much like the plain paper copying market when the relevant transactions in the *SCM* case occurred: it was foreseeable, perhaps even inevitable, but simply not yet in existence. As in *SCM*, here too the conclusion must be that MLS's formation is not actionable under § 7. The plaintiffs' attempt to distinguish *SCM* as an artifact of the occasionally tortured relationship between antitrust and patent law is not convincing. The *SCM* court explicitly allowed that the acquisition of patents, like other assets, could form the basis of § 7 liability. The court observed:

> The existing market provides the framework in which the probability and extent of an adverse impact upon competition may be measured. . . . [I]t would have been impossible to examine the effects of the [patent purchase] upon the relevant product market and sub-market . . . because those markets did not come into being until [after the purchase].

SCM, 645 F.2d at 1211.

More fundamentally, the flaw in the plaintiffs' existence-by-inevitability argument is that the inevitability of a professional soccer league is not the same as the inevitability of multiple competitors. Granting that there would inevitably be a league, it was not inevitable that the league would be formed and would operate the same way as previous sports leagues. *See* Areeda, ¶ 1478d, at 358-59 (1986) (proposing a "Hypothetical Football League" that resembles MLS and

differs from historical leagues). By its very existence MLS has shown that a sports league can be organized differently, at least when it comes to existence by creation and not by evolution.

The defendants are entitled to judgment in their favor on the Clayton Act claim.

B. *The Sherman Act Claim*

In addition to the Clayton Act theory, the plaintiffs urge that the formation of MLS, by which multiple operator-investors combined to create the single entity, also violated the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade.

It is generally held that a coming together that does not violate § 7 of the Clayton Act does not violate § 1 of the Sherman Act either. *See White Consol. Industries v. Whirlpool Corp.*, 781 F.2d 1224, 1228 (6th Cir.1986) (failure to show Clayton § 7 violation precluded Sherman § 1 violation for same conduct). A merger of market participants that does not lessen competition and thus does not offend § 7 ordinarily would not constitute a combination in restraint of trade in violation of § 1. Though the statutory provisions present slightly different modes of analysis, when those modes are applied to the same constellation of facts, the answer will ordinarily be the same.

Here, the pertinent facts are that the founding investors of MLS created both a new company and simultaneously a new market, in effect increasing the number of competitors from zero to one. As explained above, that did not represent a lessening of actual or potential competition in an existing market. Similarly, it did not represent a "sudden joining of . . . independent sources of economic power previously pursuing separate interests," *see Copperweld*, 467 U.S. at 770, 104 S.Ct. 2731, which is what is forbidden by § 1.

V. CONCLUSION AND ORDER

For all the reasons set forth above, the defendants' motion for summary judgment in their favor under Counts I and IV of the Amended Complaint is GRANTED. It follows that the plaintiffs' motion for summary judgment on the defendants' "single entity" defense is DENIED.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 97-10342-GAO

IAIN FRASER; STEVE TRITTSCHUH; SEAN BOWERS; MARK SEMIOLI; RHETT HARTY; DAVID SCOTT VAUDREUIL; MARK DODD; AND MARK DOUGHERTY,
Plaintiffs,

v.

MAJOR LEAGUE SOCCER, L.L.C., and UNITED STATES SOCCER FEDERATION, INC.,
Defendants.

VERDICT ON SPECIAL QUESTIONS TO THE JURY

O'TOOLE, D.J.

I. The Relevant Market

1. Have the plaintiffs established that the relevant geographic market for this action is the market in the United States of America?

Yes _____ No _____

2. Have the plaintiffs established that the relevant services market in this action is of Division I professional soccer and does not include other professional soccer leagues or teams, such as Division II, Division III, or indoor soccer?

Yes _____ No _____

If your answer to both Question 1 and Question 2 is *NO* proceed no further. The foreman should sign the verdict form and notify the court.

II. Monopolization

3. Have the plaintiffs established that Major League Soccer, L.L.C. possesses monopoly power in the relevant market as you have defined that market in response to Questions 1 and 2?

Yes _____ No _____

If your answer to Question 3 is NO proceed to Question 7, and do not answer Questions 4, 5 or 6.

4. Have the plaintiffs established that Major League Soccer, L.L.C. willfully acquired or maintained monopoly power in the relevant market as you have defined that market in response to Questions 1 and 2 by anticompetitive or exclusionary means without legitimate business justification, or for anticompetitive or exclusionary purposes, rather than as a result of a superior product, business acumen, or historical accident?

Yes _____ No _____

If your answer to Question 4 is NO proceed to Question 7, and do not answer Questions 5 or 6.

5. Have the plaintiffs established that the members of the plaintiff class were injured or threatened with injury in their business or property as a result of Major League Soccer, L.L.C.'s monopolization of the relevant market as you have defined it?

Yes _____ No _____

6. Have the plaintiffs established that any or all of the named plaintiffs were injured in their business or property as a result of Major League Soccer, L.L.C.'s monopolization of the relevant market?

Sean Bowers Yes _____ No _____

Mark Dodd Yes _____ No _____

Mark Dougherty	Yes _____	No _____
Iain Fraser	Yes _____	No _____
Rhett Hardy	Yes _____	No _____
Mark Semioli	Yes _____	No _____
Steve Trittschuh	Yes _____	No _____
David Vaudreuil	Yes _____	No _____

III. Attempt to Monopolize

7. Have the plaintiffs established that Major League Soccer, L.L.C. had a specific intent to achieve monopoly power in the relevant market as you have defined that market in response to Questions 1 and 2 through the use of anticompetitive or exclusionary means?

Yes _____ No _____

If your answer to Question 7 is NO proceed to Question 11, and do not answer Questions 8 through 10.

8. Have the plaintiffs established the existence of a dangerous probability of success that Major League Soccer, L.L.C. would achieve monopoly power in the relavant market as you have defined it?

Yes _____ No _____

If your answer to Question 8 is NO proceed to Question 11, and do not answer Questions 9 or 10.

9. Have the plaintiffs established that the members of the plaintiff class were injured or threatened with injury in their business or property as a result of Major League Soccer, L.L.C.'s attempt to monopolize the relevant market as you have defined it?

Yes _____ No _____

10. Have the plaintiffs established that any or all of the named plaintiffs were injured in their business or property as a result of Major League Soccer, L.L.C.'s attempt to monopolize the relevant market as you have defined it?

Sean Bowers	Yes _____	No _____
Mark Dodd	Yes _____	No _____
Mark Dougherty	Yes _____	No _____
Iain Fraser	Yes _____	No _____
Rhett Hardy	Yes _____	No _____
Mark Semioli	Yes _____	No _____
Steve Trittschuh	Yes _____	No _____
David Vaudreuil	Yes _____	No _____

IV. Combination or Conspiracy to Monopolize

11. Have the plaintiffs established that Major League Soccer, L.L.C. and the United States Soccer Federation knowingly formed an agreement or came to a mutual understanding with the specific intent of acquiring or maintaining monopoly power in the relevant market as you have defined that market in response to Questions 1 and 2?

Yes _____ No _____

If your answer to Question 11 is NO proceed to Question 15, and do not answer Questions 12 through 14.

12. Have the plaintiffs established that overt action was taken in furtherance of such agreement or mutual understanding between Major League Soccer, L.L.C. and the United States Soccer Federation to monopolize the relevant market as you have defined it?

Yes _____ No _____

If your answer to Question 12 is NO proceed to Question 15, and do not answer Questions 13 or 14.

13. Have the plaintiffs established that the members of the plaintiff class were injured or threatened with injury in their business or property as a result of a combination or conspiracy to monopolize the relevant market as you have defined it on the part of Major League Soccer, L.L.C. and the United States Soccer Federation?

Yes _____ No _____

* * * *

4. Elements of Monopolization Claim

In their first claim against MLS, plaintiffs allege that MLS has engaged in unlawful monopolization in the market for the services of major league (Division I) professional soccer players in the United States.

To prove a monopoly claim under Section 2 of the Sherman Act, a plaintiff must prove both that the defendant possessed monopoly power in the relevant market and that the defendant acquired or maintained that monopoly power willfully through the use of anticompetitive or exclusionary means, as distinguished from acquiring or maintaining it by reason of the growth or development of business because of a superior product, skillful business decisions, or historical accident. In other words, the two fundamental propositions necessary to prove a claim of monopolization are the possession of monopoly power in the relevant market and the deliberate or willful acquisition or maintenance of that power by anticompetitive or exclusionary means.

It is important to take note that the question is not whether the defendant actually exercised its monopoly power; the plaintiffs need only prove that the defendants acquired or maintained monopoly power through anticompetitive or exclusionary behavior.

So, to succeed on this claim, the plaintiffs must prove the following elements by a preponderance of the evidence:

First, that MLS possesses monopoly power in the relevant market;

Second, that MLS acquired or maintained that power willfully through anticompetitive or exclusionary conduct; and

Third, that plaintiffs were injured in their business or property because of such monopolization.

It is necessary for me do [sic] define more precisely for you some of the key concepts in those propositions. First, what does it mean to have monopoly power in a relevant market? Second, how do we determine what is a relevant market? Third, what does it mean to acquire or maintain monopoly power willfully through anticompetitive or exclusionary conduct? Finally, what needs to be shown to establish an injury to business or property?

5. Monopoly Power

Monopoly power is the power to dominate or control a market for goods or services. Monopoly power is the power either to control prices or to exclude competition from the relevant market.

Let me explain that briefly. In a competitive market, any one firm that raises the price for its product above competitive levels will lose customers who prefer to buy a similar product from another supplier whose price is lower because it is at a competitive level. If a firm has monopoly power, however, it may be able to raise its price without losing customers, because there are not competitors to whom the customers can turn for a satisfactory, lower-priced substitute for the monopolist's product. In this circumstance, the customers end up paying higher prices, not because the monopolist's product is any better, but because of the absence of competition.

Similarly, a firm possessing monopoly power may be able to use that power to prevent potential new competitors from entering the market and offering competing products which would introduce actual competition that would tend to bring the monopolist's price down. .The possession of monopoly power might permit a firm to create effective barriers that would prevent or discourage new firms from entering into competition with it.

In this case, we are talking about what the economists call "monopsony power." Monopsony power is defined exactly

the same way monopoly power is defined. The only difference is that the term monopoly is used to describe a seller of goods and services, while the term monopsony is used to describe a buyer of goods or services.

MLS is a buyer of player services, and the plaintiffs allege that it has monopsony or monopoly power in the labor market. Of course, when the firm alleged to have monopoly power in a market as a buyer of services, the power to control prices is the power to pay lower than competitive wages for the services being acquired without having the sellers of those services—the players—turn to another league or team for employment.

Finding that a firm possessed monopoly power does not require you to find that it exercised that power. The first element of the claim for monopolization refers only to the possession of monopoly power. Whether it was abused or to what effect will be considered in connection with other elements that we will address shortly.

6. Relevant Market Generally

Whether a firm possesses monopoly power is determined not in the abstract but by reference to a particular area of commerce. This is usually referred to as the relevant market, that is, the economic market for goods or services in which the firm participates as a buyer or seller. There is no general definition that works for all cases. Rather, in each case, the determination of the relevant market must be made by assessment of all the pertinent factors present in the particular case under consideration, as shown by the evidence.

There are two aspects or dimensions of the relevant market. One dimension describes the relevant market in terms of what it is that is being bought or sold. In cases involving the sale of goods, this is usually called the product market. In this

case, involving the purchase of the services of soccer players, we might call it the services market. The other aspect or dimension is the geographical reach of the market.

Here, the parties dispute both aspects of the relevant market—both the scope of the services market and the scope of the geographic market.

In substance, with respect to both aspects, the fundamental question is, what is the scope of effective competition for the services in question?

7. Relevant Services Market

The plaintiffs assert that the relevant services market is the market for the services of major league (Division I) professional outdoor soccer players. The defendants disagree that this is the appropriate definition, saying that the services market includes not only Division I professional outdoor soccer, but also Division II, Division III, and indoor soccer leagues or teams.

As this difference indicates, controversies about the scope of a product or services market are controversies about how broadly or narrowly it is defined. That depends on what the evidence shows you about how decisions are made as a practical matter by buyers and sellers of the product or services in issue.

A key concept is the concept of "substitutability". In a product market, for example, product A may be said to be in the same market as product B if buyers of the product A would generally accept product B as a reasonable substitute for product A if they choose not to buy product A because its seller has raised its price. Translating to a services market in a monopsony case, different employers may be said to be within the same labor or services market if persons employed

by one employer will generally seek employment from another employer if the first employer lowers the wage it offers to pay.

The parties will argue to you why you should consider the relevant services market to be, as the plaintiff contends, the market for outdoor Division I soccer only, or, alternately, why you should consider it to be broader than that, as the defendants contend. It will be up to you to resolve that issue on the evidence. Remember the basic point of the inquiry is to determine the scope of effective competition for professional soccer players' services.

8. Relevant Geographic Market

The relevant geographic market is the geographic area within which there is effective competition for the services at issue.

The plaintiffs contend that the relevant geographic market for this case is the market for players' services within the United States. The defendants contend that the geographic market is not limited to the United States, but encompasses other areas as well, such as Europe and Latin America.

Again, the concept of "substitutability" may help you here. You might ask yourselves what the geographic area is within which professional soccer players employed by MLS can reasonably find substitute employment with other employers. The relevant geographic market may be considered the geographic area within which MLS faces competition and to which players can turn, as a practical matter, for alternate opportunities for employment as professional soccer players.

9. Individual Preferences as a Factor in Determining Relevant Market

As I have said, determining the scope or extent of the relevant market for the purposes of measuring a firm's power to control prices or exclude competition in that market

requires careful assessment and evaluation of all the circumstances shown in the evidence that may bear on the question. It is a question that must be answered on the particular and peculiar facts of each case.

One of the factors you may consider is the preferences of buyers and sellers, as indicated by the way they actually behave. But individual preferences are not by themselves determinative if the circumstances indicate that as a practical matter economic decisions are made on the basis of other factors as well. Thus, if you find that American players prefer to play in the United States and prefer not to play in Europe, or that that [sic] players would prefer to play at a Division I level, rather than Division II or III, or prefer to play outdoor, rather than indoor, soccer, then you may take those matters into account as you consider the scope of the relevant market.

But such preferences, if you find they exist, are not automatically determinative, to the exclusion of other pertinent factors, in establishing the limits of the services or geographic markets. You might find, for example, that despite the existence of such preferences, players will in fact seek and accept employment alternatives that are not their first preference. In that case, the scope of the relevant market would be defined by what actually occurs, rather than by what preferences might be expressed.

In defining the relevant market for the purposes of a claim of monopolization, the question always remains the scope of effective economic competition.

10. "Input" and "Output" Markets

Another distinction between kinds of markets that you may need to consider in your deliberations is the distinction between an "input" market and an "output" market.

In economic terms, "inputs" are goods and services that a firm buys in order to use them in turn to produce other goods

or services that the firm will sell. So, as a classic illustration, raw materials are "inputs" to a finished product. The manufacturer purchases the raw materials and uses them to produce the finished product it will sell. Labor employed in manufacturing the finished product also amounts to an "input."

On the other hand, the finished product that is manufactured using labor and raw materials is the firm's "output."

A firm purchases or acquires labor and materials for the production of its own products or services in what is called the "input" market, and sells its finished products or services in what is called the "output" market.

In this case, the players' services are an input to the MLS output, which is professional outdoor soccer matches. The compensation that MLS pays its players is determined in the input market – that is, the labor market for players' services. It is this input market that the players contend has been monopolized by MLS.

Although you are asked to decide whether MLS has monopolized the "input" market, you may take into consideration what occurs in the "output" market in determining whether the plaintiffs have proved that the conduct of MLS lacked legitimate business justification, such as increasing competition in the output market.

* * * *

13. Single Entity Structure

As you have heard, MLS was formed as a single company, and many of its business decisions, including those related to the hiring and compensation of player, are made centrally by the league, rather than by individual teams, as may be the case in other sports.

I remind you, as I had occasion to instruct you in the course of the trial, that it was lawful for MLS to have organized itself in the way it did. You may not consider the decision to organize the league as a single firm as a decision that lacked legitimate business justification as you consider whether the plaintiffs have proved the acquisition or maintenance of monopoly power through anticompetitive or exclusionary means.

* * * *

19. Conspiracy to Monopolize

The first two claims I have described for you are asserted only against MLS. The plaintiffs assert their third claim, for combination or conspiracy to monopolize, against both MLS and the USSF.

The establish this claim, the plaintiffs must prove each of the following propositions by a preponderance of the evidence:

First, that there was an agreement between two or more persons to achieve or maintain a monopoly within the relevant market;

Second, that defendants conspired, combined or otherwise entered into that agreement with the specific intention or purpose of achieving such a monopoly;

Third, that one or more of the defendants committed an overt act in furtherance of the combination or conspiracy;

Fourth, that the plaintiffs were injured in their business or property as a result of the combination or conspiracy to monopolize.

Most of these terms I have defined, and I will not repeat those definitions. There are two matters unique to the claim of conspiracy to monopolize that you must understand.

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APPENDIX F

CLASS PLAINTIFF'S PROPOSED
INSTRUCTION NO. L-6

Relevant Market

If monopoly power exists, it must be found to exist within an economically meaningful market, or what is called a relevant market.

Defining the relevant labor market is essential because you are required to make a judgment about whether MLS has the requisite monopoly power to control wages or exclude competition. To do so, you should consider whether any effective competition significantly restrains MLS's ability to control wages for its players.

There are two aspects you must consider in defining a relevant market. The first is the relevant geographic market; the second is the relevant product or services market.[1]

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[1] *See* ABA Sample Instructions, C-6 (as modified); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) ("Determination of the relevant market is . . . necessary. . . because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' . . . The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market. . . ") (quoting *DuPont de Nemours & Co.*, 351 U.S. at 391 (monopoly power exists when the defendant has "the power to control prices or exclude competition" in the relevant market); *SMS Sys. Maint. Servs., Inc.*, 188 F.3d at 15 (to prove a violation of Section 2 of the Sherman Act, "the plaintiff must show both that the defendant has monopoly power in a relevant [geographic and product] market and that it has maintained or increased that power through anticompetitive conduct"); *see also* Department of Justice, HORIZONTAL MERGER GUIDELINES [hereinafter "DOJ Merger Guidelines"] § 1.3 (1992) ("The agency evaluates the likely competitive impact of a merger within the context of economically meaningful markets—i.e., markets that could be subject to the exercise of market power. Accordingly, for each product or service of each merger firm, the Agency seeks to define a market in which

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CLASS PLAINTIFFS' PROPOSED
INSTRUCTION NO. L-17

Combination or Conspiracy to Monopolize Does Not Require Establishment of Monopoly Power Within a Relevant Market

As you may have noticed as I outlined the elements required to establish a combination or conspiracy to monopolize claim, there is no requirement that plaintiffs establish that the defendants actually had monopoly power, nor is there any requirement for plaintiffs to establish a relevant product or geographic market. Accordingly, even if you do not find that plaintiffs have established that defendants had monopoly power within a relevant market, you may still find for plaintiffs on their combination or conspiracy to monopolize claim if you find that plaintiffs have proven each of the elements of this claim.[2]

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firms could effectively exercise market power if they were able to coordinate their actions. . . A relevant market is described by a product or group of products and a geographic area.").

[2] *See, e.g., United States v. Griffith*, 334 U.S. 100, 106 (1948) ("a conspiracy to monopolize violates § 2 even though monopoly power was never acquired"); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980) ("no particular level of market power or 'dangerous probability of success' has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken"); *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975) ("Section 2 makes it unlawful to conspire to monopolize 'any part' of interstate commerce. Specific intent to monopolize is the heart of a conspiracy charge, and a plaintiff is not required to prove what is the 'relevant market."); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961)("In a monopolization case the market must be proved . . . because such a charge requires a showing of power to exclude competitors[,] . . . [b]ut where the charge is conspiracy to monopolize, the essential element is not the power [in some relevant market], but the specific intent, to monopolize. Section 2 makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected.").